Ahmad Yani bin Ismail & Anor v Inspector General of Police & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–46 OF 2003
HELILIAH J
20 FEBRUARY 2004

Constitutional Law — Fundamental liberties — Freedom of religion — Whether absolute — Federal Constitution arts 11, 149

Constitutional Law — Jurisdiction — High Court — Source of jurisdiction and power of the High Court — Whether court may invovle some other sources to determine courts' power apart from as may be conferred by and under federal law — Federal Constitution art 121(1)

Preventive Detention — Detention order — Detention under Internal Security Act — Grounds of detention — Threat to national security — Whether objective or subjective test applicable — Whether past activities were relevant consideration — Whether the authority must disclose facts although disclosure would be against national interest — Internal Security Act 1960 ss 8, 16 & 73

The applicants applied to this court for a writ of *habeas corpus*. The applicants were said to be associated with the activities of the Jemaah Islamiah, which teachings involve the use of armed violence. The applicants was arrested under s 73 of the Internal Security Act 1960 ('the ISA') and both the applicants were subsequently detained by orders made by the Minister pursuant to s 8 of the same Act. The issues in this case were: (a) whether the test applicable to the detention under s 73 of the ISA should be the objective test or subjective test; (b) whether the grounds of the detention of both the applicants were not within the scope of art 149 of the Federal Constitution ('the FC') and outside the purview of the ISA; (c) whether art 149 of the FC override art 11 of the FC; (d) whether the ISA was ultra vires art 11 of the FC; (e) whether the FC was capable of legitimising actions under the ISA; and (f) whether s 8B of the ISA was ultra vires the FC.

Held, dismissing the application:

(1) The recital or preamble provides merely a guide as to the object of the ISA. In invoking s 8 the Minister has to be satisfied that the association of the applicants to certain bodies have to be prevented in order to achieve the object of the Act, that is, to prevent subversion or conduct which would be prejudicial to the security of Malaysia. The preamble explained the objects and purposes of the ISA but does not entail the requirement that upon the Minister's order is being challenged there must be forwarded to the court particulars that there has in fact been a substantial number of persons identified and ascertained with which the

applicants have been identified in view to justify the detention. The applicable test will be the subjective test (see paras 12 and 16).

(2) It would lead to absurdity that every time a detention is made it must be proven that there is a threat from a substantial body of persons taking action and which action is causing fear or organised violence. The long title to the Act states *inter alia* that the Act is to provide for 'preventive detention'. It covers therefore not merely present activities of persons but also certain past activities (see para 18).

(3) The executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although the court will not question the executive's decision as to what national security requires, the court will nevertheless examine whether the executive's decision is in fact based on national security considerations and the test to be applied shall be subjective test (see para 23).

(4) The grounds and allegation of facts disclosed that the association of the applicants with the activities of certain groups identified as the 'Jemaah Islamiah', which activities involve the teachings of the use of armed violence, are considered to be not only unlawful as being outside the limits of the FC but were also considered to be a threat to national security (see para 45).

(5) The allegation of facts showed not a single act but the series of acts of the applicants. The question was whether the grounds and allegation of facts upon which the ground had been based could be said to be within the scope of the purpose for which the power of the Minister is to be exercised under s 8. The circumstances would therefore vary from case to case whether there had to be prevented the prejudicial activity which the persons are likely to commit in the future and surely the past activities are also really relevant to enable the Minister to ground his satisfaction (see para 47).

(6) The activities that the applicants had been identified to be engaged in, namely activities which were described as militant activities with certain groups which had as its objective the establishment of an Islamic State which would encompass Malaysia, Indonesia and Southern Philippine through armed violence, would not reasonably envisage a situation which would involve only peaceful means through the processes recognised within the framework of the constitution. The grounds refered to the applicants being actively involved in receiving instructions on armed warfare both in theory and through physical training from Indonesian islamic clerics were the grounds considered by the executive, and therefore those grounds were within the scope of s 8. Those grounds and allegation of facts refer to the movement of militant insurgents who may include activities such as the attempts to create unrest including the overthrowing of government through armed rebellion (see para 50).

(7) Article 149 is part of the FC and despite the fact that art 11 of the FC is not mentioned alongside articles 5, 9, 10 or 13, art 11 of the FC does not prevail or override art 149 of the FC. In the present case the Minister must have formed the opinion that the activities of the applicants did not fall within the limits of professing and preaching of religion and that cl (4) by permitting federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam clearly evinced the intention that the right accorded under art11 (1) of the FC was not absolute (see para 56).

(8) Article 121(1) of the FC stipulated that the High Courts '...shall have jurisdiction and powers as may be conferred by and under federal law'. It is wholly untenable that the words 'as may be conferred' which are simply qualified by the words 'by and under federal law' are to be construed without any limitation as to enable this court to extend the meaning that this court could invoke some other sources to determine the court's power (see para 65).

(9) Section 8B of the ISA has to be read with s 8C of the same Act of which expressly provides that judicial review includes 'proceedings instituted by way of writ of habeas corpus'. However it is misleading to suggest that what has been termed 'judicial review' includes 'habeas corpus'. Thus there seems to be a statutory definition of 'judicial review' which seems to have an infusion of the writ of habeas corpus with other forms of issue of the prerogative orders, namely, mandamus, prohibition or certiorari. The jurisdiction of the High Court in respect of prerogative writs emanate from Paragraph 1 in the Schedule to the Courts of Judicature Act 1964 ('the CJA') which is to be read with s 25(2) of the CJA (see para 68).

(10) The applicants were not merely applying for the writ of habeas corpus but averring that the court should make certain declaratory orders for the detention to be held a nullity. It was indeed a convoluted endeavour to combine proceedings in criminal jurisdiction and the processes of judicial review under O 53 of the Rules of the High Court 1980 ('the RHC') which is questionable. This process was misleading and explained how arguments on an alleged infringement of art 5(3) had been brought forth. If the detention itself is legal and the alleged infringement of art 5 even if it is capable of being upheld, does not operate ex post facto to vitiate the detention (see para 75).

(11) If it is the competence of Parliament that had to be challenged it is not by way of declaratory relief and especially so when the FC has also provided for an alternative remedy by way of an advisory board and it is equally a question of policy whether or not the constitutional safeguard provided under art 151 is adequate or not adequate (see para 83).

(12) The current schedule to the CJA undoubtedly refers, inter alia, to the writ of habeas corpus. But in the present proceedings the relief sought is not solely confined to the application for a writ of habeas corpus. There is here in addition the issue where s 8B is being assailed on the ground that it is ultra vires art 4(1), contrary to art 121 and not having gone through the processes of art 159 (see para 90).

(13) There was a wrong choice of procedure if not a misuse. The application for the writ of habeas corpus still remain under the Criminal Procedure Code ('CPC') and until O 53 the RHC is otherwise amended the process of the judicial review of administrative decision making processes available under s 365 of the CPC remain restrictive (see para 93).

(14) By attempting to assail the ISA 1960 through the process of judicial review on the ground that s 8B is ultra vires art 4(1), art 121(1) and art128(1) together with the process of applying for the writ of habeas corpus have caused this court to embark on an unproductive process as the High Court is not a repository of the 'inherent jurisdiction' to declare a law (ie s 8B) made by Parliament ultra vires art 4(1). This court would in addition decline to derogate to itself the so called inherent powers to declare s 8B ultra vires as it would amount to rendering an advisory opinion which would tantamount to judicial vandalism (see para 94).

(15) Preventive detention is anticipatory action to counteract activities which are apprehended to be prejudicial to the security of Malaysia or any part thereof. Any person or classes of persons detained under s 8 of the ISA is not being charged for any offence leading to a criminal conviction in order to intercept certain activities which are considered prejudicial to security. Therefore, there is an intelligible differentia between persons who are detained under the ISA 1960 without trial as opposed to those who are arrested under the Criminal Procedure Code and charged for the commission of offences (see para 99).

(16) The alleged violation of art 8 had not been supported by any indication of unreasonable or arbitrary action. The grounds as furnished to the applicants indicated that there was a reasonable nexus between the allegations of facts upon which the Minister has considered in forming his opinion and the purpose for which the power had been exercised. It can be reasonably seen that there is a proximate connection between the ground and allegation of facts upon which they are based and the object of the ISA, namely national security consideration (see para 102).

(17) Article 151(3) is a general safeguard clause where the words are 'This article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest'. Therefore given its ordinary meaning the words are wide and embracing. In addition, the

existence of s 16 of the ISA only seeks to emphasis that even in the context of Chapter II the rule against disclosure applies with equal force. In other words, the insertion of s 16 is not redundance, not even superfluous but inserted ex abundant cautela (see para 120).

(18) To require the arresting officers or the officers who are acting in furtherance of s 73 to disclose certain matters or information which are classified or which in their opinion to be against national interest to do so, without certain changes being made to existing legislation would lead to uncertainties which are not feasible particularly in the field of criminal law. As such, the relevant legislation has to be changed or certain procedures be emplaced before the court could compel the disclosure of information where national security consideration is being specifically impleaded for non-disclosure of information (see para 121).

[**Bahasa Malaysia summary**

Pemohon-pemohon memohon kepada mahkamah ini untuk writ *habeas corpus*. Pemohon-pemohon dikatakan telah terlibat dengan aktiviti-aktiviti Jemaah Islamiah, yang menitikberatkan penggunaan kekerasan bersenjata. Pemohon-pemohon telah ditahan di bawah s 73 Akta Keselamatan Dalam Negeri 1960 ('AKDN') dan pemohon-pemohon kemudiannya di tahan menerusi perintah yang dibuat oleh Menteri menurut s 8 Akta yang sama. Isu-isu dalam kes ini adalah: (a) sama ada ujian yang harus diterimapakai untuk tahanan di bawah s73 AKDN seharusnya ujian objektif atau ujian subjektif; (b) sama ada tahanan pemohon-pemohon tidak merangkumi di bawah skop artikel 149 Perlembagaan Persekutuan ('PP') dan di luar skop AKDN; (c) sama ada artikel 149 PP mengatasi artikel 11 PP; (d) sama ada AKDN *ultra vires* artikel 11 PP; (e) sama ada PP berkebolehan dalam mengesahkan tindakan-tindakan di bawah AKDN; dan (f) sama ada s 8B AKDN *ultra vires* PP.

Diputuskan, menolak permohonan tersebut:

(1) Mukadimah hanya membekalkan satu panduan berkenaan dengan objek AKDN. Dalam menerimapakai s 8 Menteri hendaklah berpuashati bahawa hubungan pemohon-pemohon dengan badan-badan tertentu hendaklah dihalang dalam mencapai objek Akta tersebut, iaitu untuk menghalang subversi atau tingkahlaku yang boleh memprejudiskan keselamatan negara. Mukadimah menjelaskan objek-objek dan tujuan-tujuan AKDN tetapi tidak melibatkan keperluan bahawa apabila perintah Menteri tersebut dicabar hendaklah dikemukakan kepada mahkamah butir-butir bahawa terdapatnya sejumlah besar orang telah dikenalpasti yang mana turut melibatkan pemohon-pemohon dalam menjustifikasikan tahanan itu. Ujian yang terpakai adalah ujian subjektif (lihat perenggan 12 dan 16).

(2) Ia akan terjumlah kepada kemustahilan di mana pada setiap masa tahanan dibuat ia hendaklah dibuktikan bahawa terdapat ancaman daripada sekumpulan pihak-pihak yang mengambil tindakan yang mana mengakibatkan ketakutan atau kekejaman yang terancang. Tajuk utama Akta tersebut antara lain memperuntukkan 'tahanan pencegahan'. Maka, ia merangkumi bukan sahaja aktiviti-aktiviti terkini tetapi juga melibatkan aktiviti-aktiviti terdahulu (lihat perenggan 18).

(3) Eksekutif dalam melaksanakan tanggungjawabnya, hendaklah menjadi penentu utama dalam menentukan apa yang diperlukan oleh keselamatan negara. Namun demikian, sungguhpun mahkamah tidak menyoal keputusan eksekutif dalam menentukan apa yang diperlukan oleh keselamatan negara, akan tetapi mahkamah akan memeriksa sama ada keputusan eksekutif sememangnya berdasarkan fakta-fakta keselamatan Negara (lihat perenggan 23).

(4) Alasan-alasan dan pengataan fakta-fakta mendedahkan bahawa hubungan pemohon-pemohon dengan aktiviti-aktiviti kumpulan yang dikenali sebagai Jemaah Islamiah, aktiviti-aktiviti yang mana melibatkan ajaran-ajaran yang menggunakan kekejaman senjata, adalah dianggap bukan sahaja menyalahi undang-undang kerana ia berada di luar had-had yang ditetapkan oleh PP tetapi juga dianggap sebagai ancaman terhadap keselamatan negara (lihat perenggan 45).

(5) Alasan-alasan dan pengataan fakta-fakta bukan sahaja mendedahkan satu tindakan tetapi satu siri tindakan pemohon-pemohon. Persoalan yang timbul adalah sama ada alasan-alasan dan pengataan fakta-fakta yang mana alasan tahanan didasarkan boleh dikatakan dalam lingkungan kuasa Menteri yang harus dilaksanakan di bawah s 8. Keadaan-keadaan akan berbeza bagi setiap kes dalam menghalang aktiviti-aktiviti prejudis yang akan dilakukan pada masa hadapan dan sesungguhnya aktiviti-aktiviti terdahulu adalah juga relevan dalam membolehkan Menteri mencapai kepuashatiannya (lihat perenggan 47).

(6) Aktiviti-aktiviti yang telah dikenalpasti di mana pemohon-pemohon terlibat, iaitu aktiviti-aktiviti yang boleh digambarkan sebagai aktiviti-aktiviti ketenteraan dengan segolongan kumpulan yang mempunyai objektif untuk menubuhkan Wilayah Islam yang merangkumi Malaysia, Indonesia dan Selatan Filipina menerusi keganasan senjata bukan dengan munasabahnya membayangkan satu keadaan yang aman melalui proses yang diiktiraf di bawah lingkungan perlembagaan. Alasan-alasan yang dirujuk menjelaskan bahawa kedua-dua pemohon dengan aktif menerima arahan mengenai peperangan senjata secara teori dan latihan fizikal daripada paderi-paderi Islam Indonesia dan ia merupakan alasan-alasan yang telahpun diambilkira oleh eksekutif, maka ia adalah alasan-alasan di bawah skop s 8. Alasan-alasan dan pengataan fakta itu merujuk kepada

gerakan bersifat pemberontakan yang turut merangkumi aktiviti-aktiviti umpamanya percubaan kerusuhan termasuk penggulingan kerajaan melalui pemberontakan bersenjata (lihat perenggan 50).

(7) Artikel 149 adalah sebahagian daripada PP dan meskipun bahawa artikel 11 PP tidak disebut bersama-sama artikel-artikel 5, 9, 10 atau 13, artikel 11 PP tidak mengatasi artikel 149 PP. Dalam kes ini Menteri telahpun mencapai pendapatnya bahawa aktiviti-aktiviti pemohon-pemohon tidak terjatuh di bawah had-had mengamal agama dan bahawa klausa (4) menerusi undang-undang persekutuan untuk mengawal atau menghalang penyebaran apa-apa doktrin keagamaan terhadap orang-orang yang mengamal agama Islam dengan jelasnya memperlihatkan niat bahawa hak yang diberikan di bawah artikel 11(1) PP bukanlah mutlak (lihat perenggan 56 dan 58).

(8) Artikel 121(1) PP dengan jelasnya memperuntukkan bahawa Mahkamah Tinggi '... shall have jurisdiction and powers as may be conferred by and under federal law'. Perkataan-perkataan 'as may be conferred' yang dengan jelasnya dihadkan oleh perkataan-perkataan 'by and under federal law' tidak boleh ditafsir tanpa sebarang had sehingga membolehkan mahkamah ini melanjutkan maknanya dan boleh menggunakan sumber-sumber lain untuk menentukan kuasa mahkamah (lihat perenggan 65).

(9) Seksyen 8B AKDN hendaklah dibaca bersama s 8C Akta yang sama yang dengan jelasnya memperuntukkan bahawa semakan kehakiman termasuk 'prosiding yang dimulakan melalui writ *habeas corpus*'. Walabagaimanapun adalah pernyataan yang mengelirukan untuk menyatakan bahawa apa yang telah ditermakan sebagai 'semakan kehakiman' turut termasuk '*habeas corpus*'. Maka terdapatnya definasi statutori untuk 'semakan kehakiman' yang nampaknya mencampuradukkan writ *habeas corpus* dengan perintah-perintah prerogatif yang lain antaranya, *mandamus*, larangan atau *certiorari*. Bidang kuasa Mahkamah Tinggi berkenaan dengan writ-writ prerogatif muncul dari Perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 ('AMK') yang harus dibaca bersama s 25(2) AMK tersebut (lihat perenggan 68).

(10) Pemohon-pemohon bukan hanya memohon untuk writ *habeas corpus* tetapi menegaskan bahawa mahkamah seharusnya membuat beberapa perintah deklarasi untuk menyatakan tahanan tersebut tidak sah. Ia sebenarnya merupakan usaha berpulas untuk menyatukan prosiding di dalam bidang kuasa jenayah dan proses semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi ('KMT') yang mana boleh dipersoalkan. Proses ini adalah mengelirukan dan menerangkan bagaimana hujahan berkenaan dengan dakwaan perlanggaran artikel 5(3) telah dibawa ke hadapan mahkamah. Jika tahanan itu sendiri adalah sah dan dakwaan berkenaan dengan perlanggaran artikel 5 juga sekiranya mampu

untuk disokong, ia tidak berfungsi sebagai *ex post facto* untuk mencacatkan tahanan tersebut (lihat perenggan 75).

(11) Sekiranya pencabaran dibuat adalah terhadap kecekapan Parlimen, ia tidak seharusnya menerusi relif deklarasi dan khususnya apabila PP turut memperuntukkan remedi sampingan menerusi badan penasihat dan ia juga adalah persoalan polisi sama ada perlindungan berperlembagaan di bawah artikel 151 adalah memadai ataupun tidak memadai (lihat perenggan 83) .

(12) Jadual terkini kepada AMK tanpa keraguan merujuk kepada, antara lain, writ *habeas corpus*. Tetapi di dalam prosiding ini relif yang dipohon bukan sahaja terbatas kepada permohonan writ *habeas corpus*. Tetapi dalam kes ini terdapat isu tambahan di mana s 8B sedang dicabar atas alasan *ultra vires* artikel 4(1), bercanggah dengan artikel 121 dan tidak melalui proses artikel 159 (lihat perenggan 90).

(13) Di sini terdapat pemilihan prosidur yang salah sekiranya ia bukan satu penyalahgunaan. Permohonan untuk writ *habeas corpus* masih berada dibawah Kanun Acara Jenayah ('KAJ') dan sehingga A 53 KMT dipinda proses semakan kehakiman keputusan badan pentadbir yang wujud dibawah s 365 KAJ kekal terhad (lihat perenggan 93).

(14) Dalam percubaan mencabar AKDN menerusi proses semakan kehakiman atas alasan s 8B *ultra vires* artikel 4(1), artikel 121(1) dan artikel 128(1) bersama-sama dengan proses permohonan writ *habeas corpus* telah menyebabkan mahkamah ini memulakan satu proses yang tidak produktif memandangkan Mahkamah Tinggi bukan merupakan gedung 'kuasa sedia ada' untuk mengesahkan satu undang-undang (ie s 8B) yang digubal oleh Parlimen *ultra vires* artikel 4(1). Tambahan juga Mahkamah ini menolak untuk menggunakan sebarang kuasa sedia yang dikatakan itu dengan mengesahkan s 8B *ultra vires* yang mana terjumlah kepada pemberian pendapat berbentuk nasihat yang mana terjumlah kepada vandalism kehakiman (lihat perenggan 94).

(15) Tahanan pencegahan merupakan satu tindakan jangkaan untuk bertindakbalas terhadap aktiviti-aktiviti yang dianggap sebagai prejudis kepada keselamatan Malaysia atau mana-mana bahagiannya. Mana-mana orang atau kelas orang yang ditahan di bawah s 8 AKDN yang tidak didakwa di bawah mana-mana kesalahan yang terjumlah kepada sabitan jenayah adalah bertujuan untuk mencegah aktiviti-aktiviti tertentu yang merupakan prejudis kepada keselamatan. Maka, terdapat perbezaan yang ketara di mana seseorang itu ditahan di bawah AKDN yang mana tidak merangkumi sebarang perbicaraan bertentangan dengan seseorang yang ditahan di bawah KAJ dan dituduh kerana melaksanakan kesalahan tersebut (lihat perenggan 99).

(16) Dakwaan perlanggaran artikel 8 tidak disokong dengan sebarang tanda bahawa tindakan tersebut adalah tidak munasabah atau arbitrari. Alasan-alasan yang dibekalkan kepada pemohon-pemohon menunjukkan bahawa terdapatnya kaitan yang munasabah antara pengataan-pengataan fakta yang mana Menteri telah mempertimbangkan dalam mencapai pendapatnya dan tujuan kuasa tersebut digunakan. Ia dengan nyata dapat dilihat hubungan antara alasan dan pengataan fakta-fakta yang mana tahanan tersebut disandarkan dan tujuan AKDN adalah bertujuan untuk menjaga keselamatan negara (lihat perenggan 102).

(17) Artikel 151(3) merupakan klausa perlindungan am di mana perkataan yang digunakan adalah 'This article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest'. Pemberian makna biasa perkataan-perkataan tersebut adalah luas. Tambahan pula dengan kewujudan s 16 AKDN hanya menekankan bahawa, malahan dalam konteks Bab II, kaedah berkenaan dengan pendedahan terpakai secara saksama. Dalam lain perkataan, penyelitan s 16 bukan berlebihan, malah bukan juga lebih daripada memerlukan tetapi penyelitan *ex abundant cautela* (lihat perenggan 120).

(18) Untuk meminta pegawai-pegawai atau pegawai yang menahan yang bertindak mengikut s 73 untuk mengemukakan perkara-perkara tertentu atau maklumat yang diklasifikasikan atau pada pendapat mereka bertentangan dengan kepentingan Negara untuk dikemukakan, dan tanpa pindaan kepada undang-undang tertentu akan membawa kepada ketidaktentuan yang mana tidak boleh dilaksanakan khususnya di dalam lapangan undang-undang jenayah. Maka, undang-undang relevan perlu diubah atau prosedur-prosedur tertentu perlu ditukar sebelum mahkamah dapat memaksa pengemukaan maklumat di mana alasan keselamatan negara secara jelasnya diplidkan untuk tidak mengemukakan maklumat (lihat perenggan 121).]

Notes

For cases on jurisdiction of High Court under Constitutional Law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1920–1924.

For cases on detention under Internal Security Act, see 10 *Mallal's Digest* (4thEd, 2002 Reissue) paras 1316–1317.

For cases on freedom of religion, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1257–1263.

For freedom of religion, see 2 *Halsbury's Laws of Malaysia* (1999) paras [20.189]–[20.191].

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298 (refd)
Charanjit Lai v Union of India AIR 1951 SC 1 (refd)

Chief Constable of North Wales Police v Evans [1982] 1 WLR 1160 (refd)
Chng Suan Tse v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69 (folld)
Civil Service Unions, Re; ex p Minister for the Civil Service [1985] AC 374 (refd)
Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hongkong [1986] 2 MLJ 113 (refd)
Gopalan v State of Madras 1950 AIR SC165 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals [2003] 1 MLJ 321 (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129 (refd)
Kerajaan Malaysia & Ors v Nasharuddin bin Nasir [2003] 6 AMR 497 (refd)
Kok Wah Kuan v Pengarah Penjara Kajang Selangor [2004] 5 MLJ 193 (refd)
Lee Lee Cheng v Seow Peng Kwang [1960] MLJ 1 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 188 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (refd)
Minerva Mills Ltd v Union of India AIR 1980 SC 1789 (refd)
Minister for Home Affairs Malaysia & Anor v Jamaluddin bin Othman [1989] 1 MLJ 418 (refd)
Minister for Home Affairs Malaysia & Anor v Karpal Singh [1988] 3 MLJ 30 (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449 (refd)
Munusamy v Subramaniam & Ors [1969] 2 MLJ 108 (folld)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal [2002] 3 MLJ 72 (refd)
R v Secretary of State for the Home Department, ex p Cheblak [1991] 1 WLR 890 (refd)
R v Secretary of State of Home Affairs, ex p Hosenball [1977] 1 WLR 766 (refd)
Tan Sri Raja Khalid bin Raja Harun, Re; Inspector of Police v Tan Sri Raja bin Raja Harun, Re [1988] 1 MLJ 293 (refd)
Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50 (refd)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293 (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Constitution of India (42nd Amendment) Act 1976 [Ind] s 55
Courts of Judicature Act 1964 s 25(2)
Criminal Procedure Code s 365
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)
Federal Constitution arts 5, 9, 10, 11, 13, 121(1), 128(1), 149, 151(1)(b), 151(3)
Internal Security (Detained Persons) Rules 1960 r 81

Internal Security Act 1960 ss 8(1), 8B, 11(2)(b), 16, 73(1)
Malaysia Act 1963 s 3(1)
Official Secrets Act 1972 s 2C
Rules of the High Court 1980 O 53
Sabah Immigration (Amendment) Act 1997 s 59A
Singapore Constitution of the Republic [Sing] arts 93, 149

Edmund Bon (Amer Hamzah bin Arshad, Edward Saw and Latheefah Koya with him) (Chooi & Co) for the applicants.

Mohd Hanafiah bin Zakaria (Suhaimi bin Nik Sulaiman with him) (Senior Federal Counsel) (Attorney General's Chambers) for the respondents.

Heliliah J:

[1] The two applicants for the writs of *habeas corpus* had been arrested under s 73 of the Internal Security Act 1960 ('ISA 1960') and then subsequently detained by orders made by the Minister pursuant to s 8 of the same Act. Inthe proceedings held before me learned counsels for the applicants, in challenging the validity of the arrests and the legality of the detention orders, have advanced broadly certain propositions which could considered under the following headings ie

(1) the test applicable to the detention under s 73 should be the objective test;

(2) the grounds of detention in respect of both the applicants are not within the scope of art 149 of the Federal Constitution ('FC') and outside the purview of the ISA 1960. Attendant upon this is also a contention that art 149 FC does not override art 11 of the FC and in consequence of which the ISA 1960 is *ultra vires* art 11, art 149 is therefore not capable of legitimising actions under the ISA 1960 and the ISA 1960 should be struck down;

(3) Section 8B ISA is *ultra vires* the FC as it removes or infringes (or at least attempts to remove or infringe) a basic feature that is the rights of the applicants to seek judicial review and redress against executive action. And included under this heading is the proposition that since s 8B of ISA is a violation of such a right the arrest and detention was bad and amounted to a *mala fide* detention.

[2] In addition a declaration that the detention of the applicants is illegal, unlawful and a nullity is also prayed for. There are issues concerning art 5 and art 8 of the FC but I consider that these are to be subsumed to the main contention indicated above.

[3] I would like to observe at the very outset that all the aforementioned contention are interwoven and while submissions have been made in the order indicated above I wish to deal with them in a different order. I wish to deal with the submission which fall under the second heading, the third heading and finally the first heading as mentioned above in that order.

[4] Secondly it is also observed that the underlying thrust of the applicants' argument is that:

(a) their detention and the arrests preceding that detention were flawed if the decision made in respect of their detention is itself illegal. The decision is rendered illegal if it contravenes or is in excess of the powers which authorised the making of that decision; or

(b) the decision to detain was made for an objective or purpose other than that for which the power to make the decision was conferred. Counsel used the expression '*mala fide*' in the context of the object or purpose for which the applicants have been detained.

[5] Thirdly the fourth respondent was no longer made a party to the proceedings.

HEADING NO 2 — THE SECTION 8 DETENTION

[6] I propose to consider the submission that have been advanced under this heading since in the course of the arguments learned counsel for the applicants has dwelt on the issue of the preamble to the ISA and art 149. Tofall within art 149 of the FC, an Act of Parliament must recite that action has been taken or threatened by any substantial body of persons, whether inside or outside the country to cause or to cause a substantial number of persons to fear organised violence against persons or property and to procure the alteration otherwise then by lawful means of the lawful government of Malaysia by law established.

[7] The specific argument of the applicants is that the respondents have failed to identify a substantial body of persons to justify the use of the ISA. Stemming from this is also the submission that there is no material evidence or details presented to show that the preconditions for the use of the ISA 1960 as contained in sub-paragraphs (1) and (2) of the first chapeau to the preamble have been satisfied.

[8] With regard to this argument, reference is made to Francis Bennion on *Statutory Interpretation* (2nd Ed) at s 246 (p 499) states:

The preamble is an optional feature in public general Acts, though compulsory in private Acts. It appears immediately after the long title, and states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed. When present, it is thus a useful guide to the legislative intention.

[9] At p 502 Bennion expresses:

A recital is so called because it recites some relevant matter, often the state of facts that constitutes the mischief the provision is designed to remedy. There may be recitals in this sense within a preamble. Or they may occur anywhere else in an Act. The specialised use of the term however confines it to a statement beginning 'Whereas ...' which forms the prefix to a section or other textual unit.'

[10] NS Bindra's, *Interpretation of Statutes* (8th Ed) states:

Where the enacting part is explicit and unambiguous the Preamble cannot be resorted to, to control, qualify or restrict it. In *Deo v Brandling* Lord Tenterdon said: 'If on a review of the whole Act a wider intention than that expressed in the Preamble appears to be the real one, effect is to be given to it notwithstanding less extensive import of the Preamble.' This position was further explained by Lord Denman in *Fellow v Clay.* 'The Preamble is often no more than a recital of some of the inconveniences, and does not exclude any others for which a remedy is given by the statute. The evil resisted is but the motive for the legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil.' Similarly, Tindal, CJ, observed in the well-known *Sussex Peerage* case; 'If the words of the statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law-giver.' An authoritative pronouncement on the subject is by Lord Halsbury LC, in *Powell v Kempton Park Racecourse Co*, where his Lordship expressed himself as follows: 'Two propositions are quite clear, one that Preamble affords useful light as to what a statute intends to reach, and another that if an enactment is itself clear and unambiguous, no Preamble can qualify or cut down the enactment.' Regarding the use which can be made on the Preamble in interpreting an ordinary statute, there is no doubt that it cannot be used to modify the language if the language of the enactment is plain and clear. If the language is not plain and clear, then the Preamble may have effect either to extend or to restrict the language used in the body or an enactment.

The enacting words of the Act are not always to be limited by the words of the Preamble and must in many instances to beyond it, and where they do so, they cannot be cut down by reference to it. The Preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, as key to the understanding of it, and as it usually states or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. The Preamble usually only mentions the general object and intention of the Legislature in passing the enactment; further it is well established that the Preamble cannot restrict the enacting part of

an Act though it may be referred to for the purpose of solving an ambiguity. Neither the Preamble nor the supposed object of an Act can control the express language of the statute. They merely afford help in the matter of construction if there is any ambiguity. Where the language is clear the court is bound to give it effect. If there is some ambiguity and if more than one constructions are possible, the court accepts the one which is consistent with the objects of the Act as explained by the Preamble.

[11] Having referred to the above it is necessary to examine s 8(1) of the ISA 1960 where the words employed are:

> 8 Power to order detention or restriction of persons.
>
> (1)*If the Minister is satisfied that the detention of anv person is necessary with a view to preventing him from acting in anv manner prejudicial to the security of Malaysia* or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years. (Emphasis added.)

[12] The recital or preamble provides merely a guide as to the object of the ISA 1960. In invoking s 8 the Minister has to be satisfied that the association of the applicants to certain bodies have to be prevented in order to achieve the object of the Act, that is, to prevent subversion or conduct which would be prejudicial to the security of Malaysia.

[13] The ancient adage 'prevention is better than cure' is perhaps an oversimplified description but this part of the argument relating to the actual evidence of substantial body of persons is to my mind untenable. If indeed the Minister were to have to wait until substantial persons have taken action against the Federation I am certain that it is not only the ISA 1960 but other legislation which would have to be invoked.

[14] The Constitution of Malaysia (at pp 354–355) *Sheridan & Groves* (3rd Ed) gave the following commentary on art 149:

> This provision, in comparatively few words, gives great powers of government to Parliament when Parliament chooses to exercise those powers. Parliament's Act must 'recite' that action has been taken or threatened. The actions or threats which could give rise to such recitation appear as broad as language could provide for. The body of persons should be 'substantial;' but 'substantial' is not defined. This body can be anywhere in the world. They need only cause fear, not actual harm, to a 'substantial number of citizens' — again not defined.
>
> To 'excite disaffection' against the Yang di-Pertuan Agong or any government in the federation, is sufficient. But what is 'disaffection' and what 'excites' it? Promoting feelings of ill-will and hostility between different races or other classes of the population likely to cause violence may invoke Parliament's awesome powers. In a society as pluralistic as that of Malaysia inciting violence between races and classes is deplorable. But can Parliament reasonably control all such actions and threats?

> Could not an appeal by one seeking political office for the support of his own ethnic group fall within the prohibited sphere? Preferential treatment being given to Malays and natives of Sabah and Sarawak by constitutional provisions (see art 153, p 382), race is *ipso facto* a political issue; and arguments on political issues often generate feelings of ill-will and hostility. …
>
> the Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50, in an extensive exegesis, has found some limits to the scope of this article. Lord Diplock, giving their Lordships' opinion said (p 54): 'The Article is quite independent of the existence of a state of emergency. On the fact of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz, that action of the kind described 'has been taken or threatened'. It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause (2) of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. *Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of anv of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence*. (Emphasis added.)

[15] The submission of the counsel for the applicants invites the following statement found in *Judicial Review: Law & Procedure* (2nd Ed) where Richard Gordon QC observed:

> With the advent of modern judicial review the importance of *habeas corpus* has diminished in recent years as a separate substantive remedy. Perhaps its most significant limitation is that it is usually a sufficient response to an application for *habeas corpus* to satisfy the court that there is *ex facie* a statutory authority for the detention without the detaining authority being required as in judicial review, to defend the legal or factual merits of the underlying decision making process leading to the detention.

[16] With the above explanation the contention of counsels for the applicants is premised on a misconceived notion that the exercise of the powers of detention under s 8 must be preceded with the actual production of evidence that there is a substantial number of persons threatening to prejudice the security of the nation. The preamble explained the objects and purposes of the ISA but does not entail the requirement that upon the Minister's order is being challenged there must be forwarded to the court particulars that there has in fact been a substantial number of persons identified and ascertained with which the applicants have been identified in view to justify the detention.

[17] Counsel's argument on the use of a preamble indicates that what is being questioned here is the use of the ISA 1960 for the reasons or the grounds that have been stated in the detention under s 8.

[18] It would lead to absurdity that every time a detention is made it must be proven that there is a threat from a substantial body of persons taking action and which action is causing fear or organized violence. The long title to the Act states inter alia that the Act is to provide for 'preventive detention'. It covers therefore not merely present activities of persons but also certain past activities.

[19] This argument again stems from the view that the objective test is to be applied and is directed towards the adequacy of the reasons or grounds for detention. It was also on the basis of this argument that the applicants have also contended that their detention is *mala fide*.

[20] It has been unequivocally argued that the court should apply the objective test in appraising the s 8 detention orders of both applicants.

[21] The reliance of learned counsel on the application of the objective approach to a s 8 order which is based on certain passages in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 cannot be taken out of context. The Federal Court in *Ezam*'s case was dealing primarily with a situation where a s 73 detention was a live issue since the Federal Court found that it had been held by the High Court judge that the detention under s 73 was lawful.

[22] Moreover there were extensive discussion by both their Lordships Steve Shim CJ Sabah and Sarawak and Abdul Malek Ahmad FCJ on the linkage between s 73 and s 8 of the ISA 1960. It has to be noted that their Lordships in both their judgments had also dwelt on the Singapore case of *Chng Suan Tze*. However the judgment of Steve Shim CJ (Sabah and Sarawak) was categorical in respect of s 73 as found at p 479B:

> The decision of the police officer is objectively justiciable. This means that the question whether a police officer has the required 'reason to believe' when he makes the arrest and detention in reliance on s 73 (1) is objectively justiciable.

[23] The Federal Court had also considered s 16 of the ISA 1960 and related to that art 151 (3) in relation to the disclosure of information. Counsels for the applicants have advanced the argument that based on the following paragraphs the objective approach is also applicable to the s 8 detention. I refer to the text of the judgment of his Lordship Steve Shim CJ Sabah and Sarawak (at p 480):

> I mentioned at the outset the necessity of examining the effect of national security considerations on the reviewability of the exercise of discretion of the detaining authority under s 73(1). Indeed, this is one of the focal points in the respondent's case.
>
> Dato' Azahar has submitted that it is important to look at the subject matter on which the authority is called upon to decide that if it concerns a matter of national security which is entirely the responsibility of the government, the courts should

not intervene. In short, the judicial process is unsuitable for reaching decisions on national security. He relies, quite obviously, on the English case of *Council of Civil Service Unions & Ors v Minister For The Civil Service* [1985] AC 374. He cites at length various passages in the speeches of the Law Lords who heard the case, but I think the following observation of Lord Fraser seems to sum up the thrust of his submission at p 402:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

I accept the correctness of that proposition. The executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although a court will not question the executive's decision as to what national security requires, the court will nevertheless examine whether the executive's decision is in fact based on national security considerations. Here, I would subscribe to the observation of Wee Chong Jin CJ (Singapore) in *Chng Suan Tze* when he said:

> It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security requires is to be left solely to those who are responsible for national security. The *Zamora* [1916] 2 AC 77 and GCHQ [1985] AC 374. However, in these cases, it has to be shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.

[24] Abdul Malek FJ in his judgment also referred to *Chng Suan Tze*'s case as follows (at p 502):

> In *Chng Suan Tze*, it was submitted that the exercise of the discretionary power under ss 8 and 10 of the Singapore Internal Security Act (Cap 143) is subject to the objective test and thus reviewable by a court of law and that to discharge this burden, the executive has to satisfy the court that there are objective facts in existence which justify the executive's decision. It was held that the President's satisfaction under s 8, the minister's satisfaction under s 10, of the Singapore law are both reviewable by a court of law as the subjective test adopted in *Karam Singh* and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions. It was also held that although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations. Similarly, although the court will not question whether detention was necessary for the purpose specified in s 8 (1), the court can examine whether the matters relied on by the executive fall within the scope of those specified purposes.

[25] It is material to note the conclusion that was made by the Federal Court in respect of the facts and circumstances of *Ezam*'s case as demonstrated in the concluding part of the judgment of Mohamed Dzaiddin Chief Justice (as he then was) at pp 469–470:

> The question for decision here is whether on the facts and circumstances of the case the appellants have discharged the burden of showing that the respondent acted *mala fide* in their arrest and detention.
>
> The thrust of the appellants' contention in this case is that the exercise of the powers of detention by the respondent under s 73(1) of the ISA is *mala fide* and improper because from the evidence and circumstances of the case, their arrest and detention was not for the dominant purpose of s 73, ie to enable the police to conduct further investigation regarding the appellants' acts and conduct which are prejudicial to the security of Malaysia, but merely for intelligence gathering which is unconnected with national security.
>
> My first observation is that despite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants' affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosives materials and weapons. Clearly, from the affidavits which I highlighted above, the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much force in the contention of learned counsel for the appellants that the detentions were for the ulterior purpose and unconnected with national security.
>
> Secondly, the affidavits in reply affirmed by the five officers of the interrogating teams failed to state that they were directly involved in the interrogations as there were no details of their involvement. They also have not deposed that they were directly involved. They also have not deposed that they had personal knowledge of the questions asked of the appellants. Their affidavits appear to be in the same format. Based on the above factors, it is safe to conclude that they are hearsay.
>
> Thirdly, it is to be noted that the replies deposed by these officers to the averments of the appellants in their respective affidavits are bare denials. Here, I agree with Haji Sulaiman that the affidavits are grossly inadequate and cannot by any stretch of the imagination amount to a credible denial or a credible rebuttal of the specific averments of the appellants that they were detained because of their political beliefs and not because they were a threat to national security.
>
> Fourthly, in the context of the above observation on the quality of the respondent's affidavits in reply, I would adopt the statement in *De Smith*, at p 334, that 'if a *prima facie* case of abuse of power by a public authority has been established, the failure of that authority to adduce any evidence in reply from which it can reasonably be inferred that the avowed purposes had in fact been pursued may lead a court to the conclusion that they have not been genuinely pursued'.'

[26] I agree with the Senior Federal Counsel for the respondents that this court must pay heed to the facts in *Ezam*'s case but also to the point that the Federal Court was primarily addressing the legality of the s 73 detention. The judgment of Steve Shim CJ Sabah and Sarawak (at p 472) raised the threshold issue of the reviewability and justiciability of the exercise of discretion under s 73(1)(a) and (b):

> On this issue, I will take the same approach as Wee Chong Jin CJ (Singapore) in *Chng Suan Tze* and examine it from two perspectives, namely: (a) whether the objective or the subjective test applies to the exercise of discretion under s 73(1) of the ISA; and (b) the effect of national security considerations on the reviewability of such discretion.

[27] Again in the concluding part of his judgment his Lordship made it clear as follows:

> For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s 73 (1) of the ISA are therefore unlawful. Inthat context, I agree that the appeals should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants, ie first, third, fourth and fifth appellants have now been detained by order of the minister under s 8 of the ISA, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of a different exercise.

[28] Earlier on in another of the judgment his Lordship Steve Shim had also considered the connection or link between s 73(1) which incorporates the words 'reason to believe' and s 8 as well as two previous decision of the Federal Court (*Re Tan Sri Raja Khalid* and *Theresa Lim*) I find it necessary to reproduce the part (at p 473):

> From the excerpts above, it seems clear that both *Re Tan Sri Raja Khalid* and *Theresa Lim* are decided principally on the basis that ss 73(1) and 8 are inextricably linked and as such, s 16 of the ISA which expressly applies to s 8, should, by implication, also apply to s 73(1), thereby giving rise to a situation where the court would be precluded from inquiring into the existence and/or sufficiency of the grounds under the section aforesaid. On that basis and reinforced by the provisions of cl (3) of art 151 of the Federal Constitution ('the Constitution'), they hold that the subjective test should apply in determining the words 'reason to believe' in s 73(1). Everything, itseems, turns upon this inextricable connection between ss 73(1) and 8. Thus, it becomes an issue for consideration.
>
> By 'inextricably connected' I would take it to mean that ss 73(1) and 8 are wholly dependant on each other — that there has to be a police investigation under s 73 before the minister can properly exercise his discretion to issue a detention order under s 8, or conversely, that no detention order under s 8 can properly be issued by the minister without the necessary investigation by the police under s 73. In my view, such a proposition would have the effect of inhibiting or restricting the

unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s 73. What matters of national interest are infinitely varied. So are matters of national security of the State. These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may well be other public considerations of a political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s 73 may stop short of submission or reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the minister. Does it then follow that the powers of the minister under s 8 have become impotent and stagnant?

Clearly, if it was the intention of Parliament to impose a mandatory obligation on the part of the minister to consider the police investigation under s 73 before he could issue a detention order under s 8, Parliament would have expressly provided for it as she did in the Dangerous Drugs (Special Preventive Measures) Act 1985, wherein s 3(1) states:

> Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under sub-s (2) of s 6.

And s 6(1) states:

> Whenever the Minister, after considering:
>
> (a) the complete report of investigation submitted under sub-s (3) of s 3; and
>
> (b) the report of the Inquiry Officer submitted under sub-s (4) of s 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking In dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.'

Quite clearly, in the case where the minister is deciding whether or not to issue a detention order under the Dangerous Drugs (Special Preventive Measures) Act, he has to consider the police investigations or reports submitted to him, There is a mandatory obligation for him to do so. Such express provisions are conspicuously absent in ss 8 or 73 of the ISA.

Examined in the context stated, it must mean that although ss 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s 73(1) and vice versa. In the circumstances, it cannot therefore be said that they are 'inextricably

connected'. In this respect, I must, with the greatest respect, defer from the view expressed in *Re Tan Sri Raja Khalid* and *Theresa Lim*.

[29] The next part of his Lordship's judgment was particularly addressed towards the effects of s 16 of the ISA 1960 which I shall dwell upon later under the first heading (on the legality of the s 73 detention). Again in his concluding remarks in this part he stated:

> It therefore makes sense that the subjective judgment accorded to the minister under s 8 cannot be extended to the police in the exercise of the discretion under s73(1).

[30] In my view the passages in the judgment of the their Lordships Steve Shim CJ (Sabah and Sarawak and Abdul Malek FCJ) referred to by counsels for applicants as mentioned above do not support the argument that the subjective satisfaction of the Minister was also objectively justiciable.

[31] Counsels for the applicants have also referred to the decision in *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2003] 6 AMR 497 to contend that this court should hold the view of the Federal Court on the question of s 8 detention as obiter and to apply the approach adopted by the judge at the High Court level. With all due respect I find this line of argument unwarranted as the Federal Court had decided in *Nasharuddin*'s case that the learned judge of the High Court, on the facts of that case, should not have prbceeded to hear the motion on the s 8 after having concluded that the detention by the police under s 73(1) was unlawful since there was already at the time of having a detention order under s 8. As stated by the Federal Court at p 505:

> Here, the facts show that when the application came up for full argument before the court, the police no longer had custody of the respondent. Custody had been transferred to the Minister upon the issuance of a detention order under s 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction.

[32] What is to be noted further however was that the judgment of the Federal court delivered by Steve Shim CJ (Sabah and Sarawak) not only again treated the s 73 and 8 detention as being separate but also to affirm that the subjective satisfaction of the Minister was not objectively justiciable. This is borne out at page 511–513 after his Lordship had referred to certain cases:

> It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.
>
> If however, the court found itself compelled to intervene, as it had done in the instant case, notwithstanding the ouster clause in s 8B or the cautionary advice I

mentioned a moment ago, it must necessarily resolve the important question of whether the objective or the subjective test applies to the exercise of the Minister's discretion under s 8(1) of the ISA. In Malaysia, that question has been answered by the Federal Court in *Karam Singh*, consisting of a strong panel of eminent judges including Ong Hock Thye CJM and Suffin FCJ (as he then was). Suffian FCJ who wrote the main judgment said, *inter alia*:

> … When the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation…
>
> Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of the Ministers responsible to and accountable in Parliament, not to mere officials. Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not as in India when it must be in accordance with procedure established by law…
>
> Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

And Gill FCJ echoed the same sentiments when he said:

> … that in *habeas corpus* proceedings such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(1)(a) of the International Security Act 1960 is a matter for the personal or subjective satisfaction of the executive authority.

In my view, the pronouncements made by their Lordships in *Karam Singh* apply with equal force to the provisions of s 8 of the current ISA. Clearly therefore, in determining whether or not to issue the detention order under the said section, a subjective judgment is accorded to the Minister. The position is reinforced by s 16 of the ISA which stipulates:

> Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

The 'Chapter' cited above refers to Chapter II of Part II of the ISA which covers the Minister's powers of preventive detention under s 8. Under the said section,

the Minister is entitled not to disclose facts or produce documents if he considers it to be against national interest. Such non-disclosure must have the added effect of making the test under s 8 a subjective one.

It is in the light of the principles enunciated in *Karam Singh* that the present case ought to be examined. Here, there is evidence that the Minister had, when issuing the detention order, relied on the police report. This is reflected in his affidavit. Counsel for the respondent in para 32.3 of his outline submission stated that the Minister had relied wholly on this report and that he was satisfied that the activities of the respondent would pose a threat to the security of the nation. From this, it is immediately clear that the said report related to matters of national security which involved the respondent. The Minister was satisfied that the activities of the respondent threatened national security. That satisfaction was a subjective one. From that perspective, there would be no violation of the principles established in *Karam Singh*.

[33] Having considered the above I turn now to the grounds and allegation of facts.

[34] The argument that the court should apply the objective test also has a bearing on the alleged or purported defect in the grounds of detention. The grounds as stated are as follow:

PERNYATAAN DI BAWAH SEKSYEN 11(2)(b)

AKTA KESELAMATAN DALAM NEGERI 1960 (SEMAKAN 1972)

NAMA ORANG TAHANAN: AHMAD YANI BIN ISMAIL

NO KAD PENGENALAN: 680129–03–5039

(Warganegara)

ALASAN-ALASAN UNTUK PERINTAH TAHANAN

Bahawa kamu, AHMAD YANI BIN ISMAIL sejak tahun 1996 sehingga ditangkap pada 29 Disember 2001, secara sedar dan rela hati telah melibatkan diri dalam kegiatan-kegiatan yang MEMUDARATKAN KESELAMATAN MALAYSIA di mana telah menganggotai sebuah kumpulan sulit yang dikenali sebagai JEMAAH ISLAMIAH yang menjadi landasan bagi menyemai dan menanam semangat 'jihad' dan 'mati syahid' melalui usrah dan tamrin khas oleh pendakwah-pendakwah agama rakyat Indonesia yang dikenali, menghadiri kelas pengajian teori ilmu peperangan, serta menjalani beberapa siri latihan ala ketenteraan berbentuk fizikal dan teori serta pengendalian senjatapi sebagai persediaan mental dan fizikal untuk 'berjihad' memperjuangkan penubuhan sebuah Negara Islam Nusantara mengikut kefahaman kumpulan tersebut merangkumi Malaysia, Indonesia dan Selatan Filipina secara kekerasan bersenjata dan di luar Perlembagaan Persekutuan yang mana tindakan itu telah mendatangkan ancaman dan memudaratkan keselamatan negara Malaysia.

PENGATAAN FAKTA UNTUK PERINTAH TAHANAN

(1) Bahawa kamu, sejak pertengahan tahun 1996 sehingga ditangkap pada 29 Disember 2001, bertempat di Surau Salak Tinggi, Dengkil, SELANGOR secara sedar dan rela hati telah menyertai sebuah kumpulan sulit yang dikenali sebagai 'JEMAAH ISLAMIAH' yang menjadi landasan bagi menyemai serta menanam semangat 'Jihad' dan 'Mati Syahid' melalui usrah dan tamrin khas oleh pendakwah-pendakwah agama rakyat Indonesia sebagai persediaan untuk memperjuangkan penubuhan sebuah Negara Islam Nusantara mengikut kefahaman kumpulan tersebut merangkumi Malaysia, Indonesia dan Selatan Filipiana secara kekerasan bersenjata dan diluar Perlembagaan Persekutuan yang mana tindakan itu telah mendatangkan ancaman dan memudaratkan keselamatan negara Malaysia.

(2) Bahawa kamu, di antara bulan November 1999 hingga pertengahan tahun 2001, bersama-sama lebih kurang tujuh hingga tiga puluh orang anggota 'JEMAAH ISLAMIAH' telah menjalani enam siri latihan fizikal ala ketenteraan di tiga tempat berasingan di Gunung Nuang, Hulu Langat, Kajang, Selangor; Hutan Lipur, Sg Tekala, Semenyih, Selangor dan di UNIVERSITI ISLAM ANTARABANGSA MALAYSIA (UIAM) Gombak, Selangor untuk membentuk pengetahuan, kekuatan mental dan fizikal sebagai persediaan dan memperlengkapkan diri 'berjihad' ke arah penubuhan sebuah Negara Islam Nusantara mengikut kefahaman kumpulan tersebut merangkumi Malaysia, Indonesia dan Selatan Filipina secara kekerasan bersenjata dan di luar Perlembagaan Persekutuan yang mana tindakan itu telah mendatangkan ancaman dan memudaratkan keselamatan negara Malaysia.

(3) Bahawa kamu, pada awal dan pertengahan tahun 2000 bertempat di Pejabat AI-Ehsan, beralamat No 47, Taman Perwira, Teluk Panglima Garang, Banting, Selangor dan di Syarikat MNZ, Shah Alam, Selangor bersama-sama lebih kurang sepuluh orang anggota 'JEMAAH ISLAMIAH' telah menghadiri dua kelas pengajian teori ilmu peperangan di mana kamu telah diajar prinsip-prinsip peperangan dan taktik ketentenraan sebagai persediaan mental dan fizikal untuk 'berjihad' di medan perang bagi menegakkan penubuhan sebuah Negara Islam Nusantara mengikut kefahaman kumpulan tersebut merangkumi Malaysia, Indonesia dan Selatan Filipina secara kekerasan bersenjata dan di luar Perlembagaan Persekutuan yang mana tindakan itu telah mendatangkan ancaman dan memudaratkan keselamatan negara Malaysia.

(4) Bahawa kamu, pada pertenghan bulan September 2000, bertempat di sebuah dusun buah-buahan di Bt 15, Hulu Langat, Kajang, Selangor, bersama-sama dua orang anggota kumpulan 'JEMAAH ISLAMIAH' telah menjalani latihan tembak dengan menggunakan senjatapi sebagai pengalaman dalam pengendalian senjatapi secara praktikal bag! mencapai matlamat 'JEMAAH ISLAMIAH' untuk

penubuhan sebuah Negara Islam Nusantara mengikut kefahaman kumpulan tersebut merangkumi Malaysia, Indonesia dan Selatan Filipina secara kekerasan bersenjata dan di luar Perlembagaan Persekutuan yang mana tindakan ini boleh mengancam dan memudaratkan keselamatan negara Malaysia.

Dengan Arahan

Menteri Dalam Negeri

Tarikh: 22 Februari 2002 (CHE MURAD SAYANG BIN RAMJAN)

Penolong Setiausaha
Kementerian Dalam Negeri

[35] The legality of the s 8 detention in the present case is also being impugned on the alleged link with the arrest and detention pursuant to s 73. It is alleged that on the basis of the objective test applied in *Ezam*'s case the arrest and detention under s 73 being defective and illegal the link with s 8 would also render the detention under s 8 illegal. The connection is attributed to certain statements found in the affidavit affirmed by the Minister.

[36] It is also observed that the alleged connection is also brought about on account of the arguments of the counsel for the applicants that there is a failure to disclose more grounds at the time of detention and the lack of details or even failure to furnish details of the reasons for the arrest. However I also propose to deal with this aspect of the submission later when I am dealing with the question classified under the first heading that I have indicated above namely on the question of arrest preceding the detention made pursuant to the s 73(1).

[37] At this stage it is the s 8 detention itself which is to be discussed, that is, whether it is indeed *ex facie* defective. Both the applicants have alleged that their arrest and detention is a nullity from the time of arrest and remain so throughout their detention and that the s 8 orders were made *mala fide*.

[38] The allegations that they were made *mala fide* are drawn from certain statements reported in the press by the Inspector General of Police and the purported inconsistencies between their statements and the grounds which were subsequently furnished to the applicants. The second affidavits of both applicants made reference to certain statement made by the IGP in connection with the arrests of 13 persons described to be 'ahli sayap baru kumpulan Militan KMM' (eks 1 Ahmad Yani and eks 6 Abdul Samad Shukor). These statements are alleged to be in contradiction with certain other newspaper reports appearing in the Berita Harian (9th Ed, September, 2003) which contained statements by certain persons denying the existence of a group identified as Jemaah Islamiah ('JI'). Arising out of these different statements both applicants therefore challenged the validity of the grounds which were furnished pursuant

to s 11(s)(b) of the ISA 1960 and which have to be furnished with a detention order under s 8(1).

[39] It is true that the grounds and the allegations of facts upon which the grounds were made contained references to a secret group identified as 'Jemaah Islamiah' in respect of which both applicants are described as voluntary members.

[40] The affidavit filed by the IGP in opposition to the applications explained the alleged discrepancies and denied that the detention was politically motivated. The explanation furnished further in the affidavit of the IGP is to the following effect. Both the detenu are members of a new wing of the KMM. The new wing is different from another earlier wing (or the first wing). As a result of investigations undertaken it was found that the second new wing was a secret wing which was subsequently identified as the Jemaah Islamiah or JI which was not associated with the first wing. It was this second wing in respect of which the detenu/applicants were said to be associated with and which association were said to be prejudicial to the security of Malaysia.

[41] Paragraph 4 of the affidavit filed in opposition by the Minister of Home Affairs also reiterated that on the basis of reports and information received the Minister was satisfied that both applicants were (telah menganggotai) members of a secret group identified as Jemaah Islamiah (JI). The Minister's affidavit also stated that being members of that group the applicants were cultivated with the spirit of 'jihad and mati syahid' (holy war and matyrdom in a holy cause) and trained to undertake certain activities which were preparatory to the establishment of a regional (Nusantara) Islamic State comprising Malaysia, Indonesia and southern Phillipines through force and arms. The Minister also repeated that the detention was to prevent the detenu from undertaking activities which were prejudicial to the security of Malaysia.

[42] It is clear that the allegations of bad faith is on the premise of an alleged offending motive which would take the decision of the Minister outside the 'four corners' of the authorised power. I have already explained earlier that the counsels of the applicants have been erroneous in their interpretation of the preamble.

[43] It has been asserted that s 8 is couched to address and prevent future actions and the grounds have stated only past actions. In effect the brunt of the contention appears to be directed to the lack or inadequacy of reasons and facts. Once again counsels appear to deliberately ignore the processes involved in an application for *habeas corpus* where evidence is derived through the affidavits and I have already declined to agree that the objective test is applicable to the s 8 detention.

[44] In my view counsels have simply refused to accept 'preventive detention'. I wish at this stage to refer to the term 'preventive detention' and to elicit the

meaning from the case of *Gopalan v State of Madras* 1950 AIR SC 27. The expression 'preventive detention' was examined at p 91 (para 165):

> There is no authoritative definition of the term 'Preventive Detention' in Indian law, though as description of a topic of legislation it occurred in the legislative lists of the Government of India Act 1935, and has been used in Item 9 of List I and item 8 List III in Sch 7 to the Constitution. The expression has its origin in the language used by judges or the Law Lords in England while explaining the nature of detention under reg 14 (B), defence of Realm Consolidated Act 1914, passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency regulations made during the last World War. The word 'preventive' is used in contradiction to the word 'punitive'. To quote the word of Lord Finlay in *Rex v Halliday* [1917] AC 260 at p 269 (86 L JK B 1119), 'itis not a punitive but a precautionary measure'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence: vide Lord *Macmillan in Liversidge v Anderson* [1942] AC 206 at p 954; (110 LJ KB 724).

[45] The grounds and allegation of facts disclose that the association of the detenu with the activities of certain groups identified as the Jemaah Islamiah, which activities involve the teachings of the use of armed violence, are considered to be not only unlawful as being outside the limits of the FC but are also considered to be a threat to national security.

[46] Senior Federal Counsels for the respondents have submitted that the allegations of facts upon which the grounds of detention have been based as stated in the paras 1, 2, 3 and 4 (as reproduced above) indicate not only the past activities of the applicants, the activities of the applicants up to the point of time of their detention but also the objective of the group known as the Jemaah Islamiah which relates to something that is intended to be attained in the future. It cannot simply be accepted therefore that the alleged activities of the applicants relate only to past activities and do not have a nexus to something in the future. I agree with this contention for in preventive detention it is the anticipated behaviour of the applicants based on the past conduct taking into account the facts and circumstances of a particular situation.

[47] The allegation of facts show not a single act but the series of acts of the applicants. The question is whether the grounds and allegation of facts upon which the ground has been based could be said to be within the scope of the purpose for which the power of the Minister is to be exercised under s 8. The circumstances will therefore vary from case to case whether there has to be prevented the prejudicial activity which the persons are likely to commit in the future and surely the past activities are also really relevant to enable the Minister to ground his satisfaction.

[48] I agree with the Senior Federal Counsels for the respondents that in this question counsels for the detenu/applicants are raising nothing new but are in fact harping on matters which have been referred to in *Nasharuddin*'s case as well the references made in that case to certain passages in *Karam Singh*'s case. The response to the counsels' arguments could perhaps just be summed up in what had been stated by Ali FJ in *Karam Singh*'s case (at p 159):

> In this connection, I shall be content to say that in *habeas corpus* proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8 (1) (a) of the Internal Security Act 1960 is a matter for the personal or subjective satisfaction of the executive authority. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his contentions.

[49] In my view the very same situation is applicable here. I need however to mention, even if *ad nauseam*, what has also been stated in *Minister for Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 30 at p 31 in which Abdul Hamid LP (as he then was) said *inter alia*:

> With all due respect to the learned judge, he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognise that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegation of fact upon which the subjective satisfaction of the Minister was based are not.

[50] In my view it could be said here that the activities that the applicants which have been identified to be engaged in, namely activities which are described as militant activities with certain groups which has as its objective the establishment of an Islamic State which would encompass Malaysia, Indonesia and Southern Philippine through armed violence, would not reasonably envisage a situation which would involve only peaceful means through the processes recognised within the framework of the constitution. The grounds refer to the applicants have been and being actively involved in receiving instructions on armed warfare both in theory and through physical training from Indonesian Islamic clerics and I would be constrained to accept that if those are the grounds considered by the Executive, that therefore those grounds are not within the scope of s 8. Those grounds and allegation of facts refer to the movement of militant insurgents who may include activities such as the attempts to create unrest including the overthrowing of government through armed rebellion. I need to refer to the emphasis that was made by Lord Diplock in the *Council of Civil Service Unions ex p Minister for the Civil Service* [1985] AC 374, 412 that national security is 'par excellence a nonjusticiable question'.

[51] In the present proceedings the Minister of Home Affairs in his affidavit filed in opposition has specifically invoked reference to s 16 ISA 1960 read with art 151(3) FC to decline the disclosure of further details. **A**

[52] As I have stated above, the applicants' complaints about the failure to disclose further and better particulars form the real brunt of that submission. This may especially seen from the fact that the details of the representation made in response to the grounds and allegations of the facts and which were prepared for the Advisory Board have also been submitted before this court. Once again I would like to echo the unsuitability of such a move in the context of the present proceedings in respect of an application for habeas corpus. This is not a trial leading to a criminal conviction. **B** **C**

[53] I hold the view that I am completely unable to agree that the grounds as furnished to the applicants are not within the scope of the ISA and I therefore decline to add further comments on the responses submitted by the two applicants which responses were actually meant for their representation before the advisory board constituted under art 151(1)(b) of the FC. I also observe that the decision in *Ezam*'s case has not whittled away the statement of Suffian FJ (as he then was) in *Karam Singh*'s case that if 'the detainee honestly thinks that the allegations of fact are vague, insufficient, or irrelevant he should ask for particulars. Unlike his counterpart in India he has here a legal right to particulars, subject to the Minister's privilege in the public interest'. The Minister has claimed that privilege and therefore as stated by his Lordship also it is not for this court to judge the sufficiency or otherwise of the allegations of the facts. **D** **E**

[54] In its totality I therefore disagree with the submission that there has been a colourable exercise of the executive decision by the Minister. I hold the view that the allegation that the detention of the applicants have been made *mala fide* is without merits. **F**

[55] Counsels for the applicants have also alleged, in addition, that the exercise of the powers under the ISA has the effect of curtailing the rights guaranteed to the applicants under art 11 of the FC. The arguments of the counsels are that in the face of art 11, which is referred to as a constitutional guarantee, art 149 therefore cannot stand and is therefore inapplicable to legitimise actions taken under the ISA 1960 to curb their constitutional rights under art 11. I find this argument to be fallacious. **G** **H**

[56] In the first place art 149 is part of the FC and despite the fact that art 11 is not mentioned alongside arts 5, 9, 10, or 13, art 11 does not prevail or override art 149. NS Bindra on the *Interpretation of Statutes* (8th Ed) at p 874–875 contain certain observation which I wish to adopt and they are the following: **I**

A 6 *Presumption of validity — Utres magis valeat quam pareat*. When the vires of an entactment is impugned, there is an initial presumption of its constitutionality. AConstitution like statutes is to be interpreted so that it should have validity rather than perish. While the scope for application of the maxim in the case of ordinary enactments is very narrow, the caution being that the Court should not pose as the legislator, a more liberal use of the maxim is warranted in the case of a Constitution having regard to the nature of the instrument. As our Federal Court said:

B

> A Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *utres magis valeat quam pareat.*

Again, as the Privy Council has observed, with reference to the Canadian and
C Australian Constitutions, the court is to remember:

> That if there are at points obscurity in language, this may be taken to be due, not to uncertainty about general principles, but to the difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages.

D

> The Constitution has assigned a new role to the constitutional courts to ensure rule of law in the country…. Time has come to have a fresh look at the old constitutional courts to ensure rule of law in the precedents and to lay down law with the changed perceptions keeping in view the provisions of the Constitution.

E Even constitutional power when the text is doubtful may be established by usage.

> If two constructions are possible, the court should adopt that which will implement and discard that which will stultify the apparent intention of the makers of the Constitution, courts are inclined to adopt that reasonable interpretation of a statute which removes it furthest from possible constitutional infirmity.

F **[57]** Senior Federal Counsel for the respondents has submitted that the grounds as stated do not amount to an infringement of art 11 since the article itself has not conferred an unqualified right. There is a qualification contained in cl (5) which states that the article does not authorise any act contrary to any general law relating inter alia, to public order. Moreover as has been stated by
G the Supreme Court in *Minister for Home Affairs Malaysia & Anor v Jamaluddin bin Othman* [1989] 1 MLJ 418 as cited by Senior Federal Counsel and the relevant passage of which are [at p 419]:

> It is already settled law in this country that whilst the grounds of detention as stated in the detention order are open to challenge if alleged to be not within the
H scope of the legislation, the allegations of fact are not subject to review. This principle was reiterated in *Minister for Home Affairs, Malaysia & Anor v Karpal Singh*. Thus the only question for us to determine here is whether the grounds are within the scope of the Act.

The trial judge relied solely on art 11 of the Federal Constitution on the freedom
I of religion as the basis for his ruling that the detention of the respondent was unlawful. The crucial part of his judgment appears at p 108 of the appeal record where he said, when referred to s 8 of the Act:

> Although under s 8(1) of the Internal Security Act the minister may detain a person with a view to preventing that person from 'acting in any manner' prejudicial to the security of Malaysia, I am of the view the minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under art 11 of the Constitution. If the minister acts to restrict the freedom of a person from professing and practicing his religion, his act will be inconsistent with the provision of art 11 and therefore any order of detention would not be valid.

Without hesitation we say that we agree wholeheartedly with the sentiment expressed by the learned judge. However, to get our perspective right we feel obliged to add a rider to what the learned judge said. His Lordship's ruling must be read subject to the following. The freedom to profess and practise one's religion should not be turned into a licence to commit unlawful acts or acts tending to prejudice or threaten the security of the country. The freedom to profess and practise one's religion is itself subject to the general laws of the country as expressly provided in cl (5) of art 11 of the Constitution which states that:

> 11(5) This article does not authorise any act contrary to any general law relating to public order, public health or morality.

This is also alluded to in *Mamat bin Daud & Ors v Government of Malaysia*. Thus the protection conferred by art 11 of the Constitution cannot be a complete umbrella for all actions.

[58] In the present case the Minister must have formed the opinion that the activities of the applicants do not fall within the limits of professing and preaching of religion. I am also of the view that cl (4) by permitting federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam clearly evince the intention that the right accorded under art 11 (1) is not absolute. The submission of the counsels on this aspect is therefore unacceptable.

[59] Before leaving this part of the submission of the counsel for the applicants there is one other aspect that I have to deal with, namely, the alleged infringements of art 5(3) and art 8 of the Federal Constitution.

[60] The alleged infringement of art 5(3) is premised on the contention that there was present during the meeting of the detenu with their lawyers an officer of the detention camp and apparently this rendered the right of consultation accorded to them under art 5 (3) as being illusory and ineffective. Senior Federal Counsel for the respondents has cited the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, adecision at High Court level. I note that the judgment of the learned judicial commissioner had subjected r 81 of the Internal Security (Detained Persons) Rules 1960 to scrutiny for the same arguments that had been raised. In my view in dealing with this point it would suffice to refer to the relevant portions of the judgment, the approach of which I would similarly adopt namely that there is a consensus view that the right to consult a legal practitioner is subject

to certain legitimate restrictions. The parts of the judgment is found at p 468 as follows:

> For such consultations to be effective, it is submitted by the applicants that it must be free from any form of interference and restrictions. In the instant case, it is contended that consultation with the presence and within the hearing of the officers from the detention center makes such right illusory. In support of such contention, the case of *Moti Bai v The State* AIR 1954 Rajasthan 241 was referred to where the provision of art 22(1) of the Indian Constitution which have the same effect as our art 5(3) were in issue. In my view, after having considered the list of authorities on the application of art 5(3) of the Federal Constitution, there is a consensus of view that the right to consult a legal practitioner is subject to certain legitimate restrictions. (*Assa Singh v Menteri Besar Johor* [1969] 2 MLJ 30, *Ramli bin Salleh v Inspector Yahya bin Hashim* [1973] 1 MLJ 54 and *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293. In *Ooi Ah Phua v Officer in Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 Suffian LP observed the following:
>
> > With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest... A balance has to be struck between the right of arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public ... The interest of justice is as import as the Interest of the arrested person...
>
> His Lordship further referred and concurred with the view of Slide J in *Sundar Singh v Emperor* AIR 1930 Lah 945 who said at p 947:
>
> > The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation.
>
> Still on the issue of legitimate restriction, The House of Lords in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 had this to say at p 437:
>
> > Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

[61] In the light of the above I do not wish to elaborate further and the submission of counsels for the applicants on this aspect are rejected. However counsels for the applicants have dwelt on the issue of art 8 on the ground that the applicants are subjected to discriminatory treatment as the applicants have not been charged and brought to trial and therefore it would seem that the process of preventive detention itself is in violation of art 8 (1). On the question of the alleged infringement or breach of art 8, I propose to deal with the matter under the next section which deals with the following heading.

HEADING NO 3 — IS SECTION 8B *ultra vires*

[62] Under this heading learned counsels for the applicants have been emphatic that the role of the courts is of higher constitutional importance, The core argument is that any encroachment upon the jurisdiction of the court and legislation which attempts to curtail the power of the judiciary to determine the legality of the decision and orders of the Executive would be inimical to the rule of law.

[63] Section 8B as it stands does not constitute a provision which could be termed as a 'total ouster clause for it does not state the order of the Minister' shall not be questioned in court. However learned counsels have urged upon this court that judicial review is 'a basic essential feature of the Constitution' and therefore no law passed by Parliament can abrogate or take it away.

[64] However with due respect I hold the view that learned counsels have strained or attempted to stretch the limit of what is expressed as the 'inherent jurisdiction" of the High Court where s 25 of Courts of Judicature Act has been referred to. Counsels have referred to the Federation of Malaya Agreement 1948 and the Report of the Federation of Malaya Constitutional Convention 1957. While instruments such as these do constitute part of constitutional background or legislative history of the Federal Constitution, those instruments may be referred to in circumstances where the language of the provision is uncertain or obscure. For this purpose I wish to cite *Theresa Lim*'s case where in the judgment of Salleh Abas LP (as he then was) he explained:

> The next argument is that in view of art 149, the ISA should be limited to communist insurgencies alone. To support this proposition, we were invited to refer to para 174 of the Reid Commission Report and to the speeches made by the late Prime Minister Tun Abdul Razak when moving the motion in Parliament to pass the Internal Security Bill. There had been some arguments as to whether or not it is proper for the court to advert to these documents. In our view, there is no hard and fast rule about this, and certainly the courts in this country, as well as the United kingdom, admit such references but it is clear from the practice of the court that such reference is only to appreciate the legislative history of an Act, and it cannot be regarded as the basis or the determining factor for interpreting the Act or any provision of the Act. If we do that, the court will cease to be the ultimate interpreters of law because in the end what is law will be guided what the politicians said in Parliament and indeed this has been asserted recently. For this purpose, we would like to refer to a statement by Cumming-Bruce LJ in *R v Hosenball* at pp 787–788:
>
> > There are two other grounds relied upon by the appellant. One is founded upon a statement made by the Secretary of State for Home Affairs on the floor of the House of Commons to which we have been referred. It was suggested, as I understand it, that such rights as Mr Hosenball might have having regard to the scrutiny of the Act might be enlarged by the statement of the Secretary of State in the House of Commons. I cannot accept as a matter of constitutional law and

principle that where the rights of the subject or of a resident have been dealt with in an Act of Parliament a statement made by a minister in Parliament can have the effect of enlarging those statutory rights. The danger of assenting to such a doctrine is obvious. If a minister can enlarge the rights of a subject as laid down in an Act of Parliament by a statement on the floor of the House, it is but a short step to say that is constitutional for a minister to restrict the rights of a subject by making a statement on the floor of the House. By our constitution, it is Acts of Parliament and not the acts of ministers, save when the authorised by Act of Parliament or under the prerogative, that define the rights of subjects or of residents.

The expression 'that action' in our review has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provision of the Act there is nothing to show that it is restricted to communist activities.

[65] In my view the counsels have misconstrued the meaning that may be placed on the words, in art 121(1) FC where it is stipulated that the High Courts ' … shall have jurisdiction and powers as may be conferred by and under federal law' I find wholly untenable that the words 'as may be conferred' which are simply qualified by the words 'by and under federal law' are to be construed without any limitation as to enable this court to extend the meaning that this court could invoke some other sources to determine the court's power.

[66] In *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1, Thomson CJ defined 'unlimited jurisdiction' as follows:

Jurisdiction is unlimited. But unlimited jurisdiction cannot mean something different from 'power' because as regards the powers of the court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed. This leads to the conclusion that the expression 'jurisdiction' is used as meaning the authority of the court to exercise any judicial power that is given to it by the law and that when the clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorizes or requires judicial power to be exercised.

[67] I turn now to the question of what is alleged that is the High Court has an inherent jurisdiction and power of judicial review. This interpretation is alleged to have been derived from s 3 (1) of the Malaysia Act 1963. I would specifically state that nowhere in the provision of the first Constitution of Malaya has there been explicit provision relating to judicial review which could be described to have devolved to the High Court. The situation in Malaysia differs from that of India where at p 22 *Judicial Control of Administrative Action* by Justice BP Banerjee (1st Ed, 2001) states:

6 JUDICIAL CONTROL IN INDIA

The Constitution of India conferred power upon the Supreme Court under art 32 of the Constitution to issue direction, orders or writs including writs in the nature of *habeas corpus, mandamus, certiorari,* prohibition and *quo-warranto.*

The sole object of art 32, is the enforcement of fundamental rights guaranteed under Constitution. Under art 226 of the Constitution of India, powers have been conferred upon the High Courts to issue directions, orders or writs including the writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo-warranto* and *certiorari* — (a) for the enforcement of any of the rights conferred by Part III of the Constitution eg fundamental rights, and (b) for any other purpose. The words 'for any other purpose' at the end of art 226 (1) make the jurisdiction of the High Court to issue writs or orders, more extensive than that of the Supreme Court under art 32 of the Constitution. The expression 'any other purpose' in art 226 of the Constitution, in short means the enforcement of any legal rights or performance of any legal duty. Legal rights means rights which are legally enforceable. In *Basappa v T Nagappa* AIR 1954 SC 440 the Supreme Court pointed out that the language used in art 32 and 226 of the Constitution of India is very wide and the powers of the Supreme Court as well as of the High Court in India extend to issuing of orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo-warranto*, prohibition and *certiorari* as may be necessary for the enforcement of fundamental rights and in case of the High Court, for other purposes as well. In view of the express provisions in our Constitution the Court need not now look back to the early history or the procedural technicalities of these writs in English law nor feel oppressed by any difference or change of opinion expressed in a particular case by English Judges.

In *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81 the Supreme Court explained the scope of writ jurisdiction under the Indian Constitution and held that the High Court can issue writs in the nature of prerogative writs as understood in England but the scope of those writs also is widened by the use of the expression 'nature', which expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. That apart, High Courts can also issue directions, orders, or writs other than prerogative writs. The High Courts are entitled to mould the reliefs to meet the particular and complicated requirements of this country. To equate the scope of the power of the High Court under art 226 of the Constitution with that of the English courts, to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction would defeat the purpose of the article itself. There are some limitations implicit in the article and others may be evolved to direct the article through defined channels.

[68] Section 8B of the ISA 1960 has to be read with s 8C of which expressly provides that judicial review includes 'proceedings instituted by way of writ of habeas corpus'. However it is somewhat misleading here to suggest that what has been termed 'judicial review' includes 'habeas corpus'. Thus there seems to be a statutory definition of 'judicial review' which seems to have an infusion of the writ of habeas corpus with other forms of issue of the prerogative orders, namely, mandamus, prohibition or certiorari. It is the case that the jurisdiction of the High Court in respect of prerogative writs emanate from para 1 in the Schedule to the Courts of Judicature Act 1964 ('CJA 1964') which is to be read with s 25 (2) of CJA 1964.

[69] In *Munusamy v Subramaniam & ors* [1969] 2 MLJ 108 it has been ruled that the proper procedure to serve *habeas corpus* is for the applicant to apply under s 365 of the Criminal Procedure Code. However, the additional power conferred by s 25(2) of the CJA 1964 on the High Court to issue habeas corpus makes it subject to any written law or Rules of the Court. Presently the only written law in relation to habeas corpus is still s 365 of the Criminal Procedure Code.

[70] The procedure for the other prerogative writs of *mandamus*, prohibition or *certiorari* in the High Court are subject to O 53 of the Rules of the High Court 1980 whereby an application for *habeas corpus* is expressly excluded.

[71] The reason for which I find it necessary to mention the aforesaid distinction is that there is to some extent a difference between judicial review and *habeas corpus* is stated in *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 where Lord Donaldson MR at 894 D has explained:

> A writ of *habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it.

[72] However it may still be arguable that this is too simplistic and that there could still be an overlap between *habeas corpus* and judicial review. Nevertheless in the situation before me there is also being sought a declaratory order. This is not however to be equated with an application for *certiorari* where what may be sought is to quash an alleged unlawful decision.

[73] It is very clear here that counsels for the applicants are not merely applying for the writ of *habeas corpus* but averring that the court should make certain declaratory orders for the detention to be held a nullity. In my view this is indeed a convoluted endeavour to combine proceedings in criminal jurisdiction and the processes of judicial review under O 53 which is questionable. This process is misleading and explains how arguments on an alleged infringement of art 5(3) have been brought forth. If the detention itself is legal, in my view the alleged infringement of art 5 even if it is capable of being upheld, does not operate *ex post facto* to vitiate the detention.

[74] With regards to the principle of judicial non intervention of the merits of a discretionary decision Abdoolcader J has stated in *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 in relation to proceedings pertaining to the writ of *habeas corpus*:

> the Court does not sit in appeal against the decision of the Minister regarding materials on which the detention order was made. The court does not examine the adequacy or truth of these materials and cannot interfere with the decision on the

ground that if the court had examined them it would have come to a different conclusion.

[75] Even if it could be said that the proceedings in an application for a writ of *habeas corpus* and judicial review are not mutually exclusive. Lord Hailsham in [1982] 1 WLR stated (p 1160):

> ...it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is *Chief Constable of North Wales Police v Evans* no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

[76] In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at 419 the Supreme Court stated:

> … judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

[77] In referring to s 8B as 'a complete ouster clause' of the court's jurisdiction it would appear that counsels for the applicants have once again selectively ignored s 8C. In describing s 8B as *ultra vires* the Constitution, it is said that s8B has removed or infringed a basic feature of the Constitution described as 'the right to seek judicial review and redress against Executive action.'

[78] In advancing this agreement the counsels for the applicants have chosen to link this argument to a further argument that any amendment to the Constitution must not diminish or derogate the basic feature of the Constitution and reference has been made to the statements of Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 188. His Royal Highness in delivering the judgment of the Federal Court then had stated *inter alia*:

> … It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach…. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not men.

[79] Apart from *Loh Kooi Choon*'s decision counsels for the applicants have also referred to *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789. The majority judgment in that case was addressing s 55 of the Constitution of India (42nd Amendment) Act 1976. The head notes indicated that s 55 introduced two new clauses in art 368 namely cll (4) and (5). Clause 5 conferred upon the Parliament a vast and undefined power to amend the Constitution and even so to distort it out of recognition. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the

exercise of that limited power enlarge that very power into an absolute power. A limitation on that power cannot be destroyed. Parliament cannot under art368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution.

[80] It is obvious that the two abovementioned cases have been specifically referred to by counsels for the applicants, in order to substantiate the submission that by incorporating s 8B, Parliament has given to itself power *carte blanche* under art 149 to oust the court's power of judicial review.

[81] In this context counsels for the applicants have also urged this court to consider what has been effected in the Republic of Singapore whereby an amendment was made to the corresponding art 149 in the Constitution of the Republic. That amendment made in 1989 introduced the following additional clause which is as follows:

> 149(3) If, in respect of any proceeding whether instituted before or after 27 January 1989, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.

[82] Counsel for the applicants seemed to suggest that the introduction of s 8B into the ISA 1960 would be more acceptable if a provision similar to cl (3) as mentioned above was also duly incorporated in art 149 of the FC. I find such argument to be paradoxical for in my view it seems to be oblivious of the fact that art 93 of the Singapore Constitution refers to judicial power and the total effect of the new cl (3) in my view provides a further shield to judicial review. But apart from stating this I find it unnecessary to engage in such comparisons and in this context I would choose to reiterate what was also opined by Raja Azlan Shah FJ in the same *Loh Kooi Choon* case where His Royal Highness also observed at p 188:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors*:
>
> > some people may think the policy of the Act to be unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend as unwise as it is unprofitable to cavil at the policy of the Act of Parliament, or to pass a covert censure on the Legislature.

[83] In my view in the present proceedings before me counsels should have considered that if it is the competence of Parliament that has to challenged it is not by way of declaratory relief and especially so when the FC has also provided for an alternative remedy by way of an advisory board and it is equally a question of policy whether or not the constitutional safeguard provided under art 151 is adequate or not adequate.

[84] The Federal Court in *Nasharuddin*'s case has in the course of its judgment also considered s 8B where the decision of the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal* [2002] 3 MLJ 72 in construing another ouster clause found in s 59A of the Sabah Immigration (Amendment) Act 1997.

[85] In the course of his judgment Steve Shim CJ (Sabah and Sarawak) observed:

> At this point, it may be appropriate to note that the pre-amended s 59A of the Sabah Immigration Act referred to in *Sugumar Balakrishnan* was very much similar in terms to s 9(6) of the Industrial Relations Act 1967 which came up to consideration by the Supreme Court in *Tanjong Jaga Sdn Bhd v Minister of Labour & Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368. Therein, Abdoolcader FCJ observed that s 9(6) which postulated a privative clause was ineffective as regards jurisdictional error. (See also *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471).
>
> Given the established authorities referred to, it cannot be said that the Federal Court in *Sugumar Balakrishnan* has broken any new ground in determining the extent and scope of ouster clauses. There is no paradigm shift. It has followed entrenched principles which can effectively be summed up as follows: that an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; and if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause.
>
> Now, s 8B of the ISA is almost identical to s 59A of the Sabah Immigration Act. In my view, the words in s 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious ie, that the jurisdiction of the court is to be ousted in terms stated in s 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention. Section 8B is therefore intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA except as regards any question on compliance with any procedural requirement relating to the act or decision in question.
>
> Given the proper interpretation to be placed on s. 8B what is the position in the instant case? Here, there is evidence that the impugned order was issued by the relevant Minister. There is also evidence that he had issued it in the exercise of his

discretionary power under or in accordance with s 8(1) of the ISA. Furthermore, evidence shows that all the necessary procedural requirements had been complied with by the Minister in issuing the detention order. Indeed, the respondent made no complaint on this score.

[86] It has been urged upon this court that presently it is still open for the court not to apply the reasoning in *Sugumar*'s case for *Nasharuddin*'s case apparently did not take full account of certain decision in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 and *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1. I detect an initial fallacy in counsels for applicants' argument that the Federal Court is always bound by another decision of the Federal Court regardless of facts and circumstances. In my view the *Hoh Kiang Ngan*'s case and *MPPP*'s case pertain to the powers and procedures of statutory authorities whereas the *Sugumar* decision concerns the discretionary powers of the Minister. In this line of argument, it is my view that the counsels for the applicants have emplaced a strained view of *stare decisis*.

[87] I have also stated above that I do not discern that the Minister has committed an error of law by taking into account irrelevant consideration or the *mala fide* consideration as alleged by counsels. I revert once more to *Exparte Cheblak*'s case where certain passages in the judgment of Lord Donaldson of Lymington MR. Those passages related to the deportation of alien. Nevertheless those passages reflect a similar *raison d'etre* which I wish to apply and they are as follows:

> The applicant complains that this is wholly insufficient to enable him to meet the allegation that his departure from the United Kingdom would be conducive to the public good. In reply Mr Usher, a Senior Executive Officer in the Home Office, has sworn an affidavit on behalf of the Home Secretary stating: 'Further details . . . cannot be disclosed because to do so would pose an unacceptable risk to national security'.
>
> There is no suggestion, still less any evidence, that either the Home Secretary or Mr Usher is so asserting are acting otherwise than in the utmost good faith. We are therefore, not for the first time, faced with a collision between two imperatives, the rights of the individual citizen, albeit a visitor to our shores, and the needs of national security. Of that Geoffrey Lane LJ said in *Reg v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766, 783–784:
>
> > There are occasions, though they are rare, when what are more generally the rights of an individual must be subordinated to the protection of the realm. When an alien visitor to this country is believed to have used the hospitality extended to him so as to present a danger to security, the Secretary of State has the right and, in many cases, has the duty of ensuring that the alien no longer remains here to threaten our security. It may be that the alien has been in the country for many years. It may be that he has built a carrier here in this country, and that consequently a deportation order made against him may result in great hardship to him. It may be that he protests that he has done nothing wrong so

far as this country's security is concerned. It may be that the protests that he cannot understand why any action of this sort is being taken against him. In ordinary circumstances common fairness - you can call it natural justice If you wish — would demand that he be given particulars of the charges made against him; that he be given the names of the witnesses who are prepared to testify against him and, indeed, probably the nature of the evidence which those witnesses are prepared to give should also be delivered to him. But there are counterbalancing factors. Detection, whether in the realms of ordinary crime or in the realms of national security, is seldom carried out by cold analysis or brilliant deduction. Much more frequently it is done by means of information received. Courts of criminal jurisdiction have for very many years indeed, if not for centuries, given protection from disclosure to sources of information. One can see that in *Rex v Hardy* (1994) 24 St Tr 199, 808, which was cited by Lord Simon of Glaisdale in *Reg v Lewes Justices, ex parte Secretary of State for the Home Department* [1973] AC 388, 407.

The reasons for this protection are plain. Once a source of information is disclosed, it will cease thereafter to be a source of information. Once a potential informant thinks that his identity is going to be disclosed if he provides information, he will cease to be an informant. The life of a known informant may be made, to say the least, very unpleasant by those who, for reasons of their own, wish to remain in obscurity. Thus, take away the protection, and you remove the means of detection; and, when the security of the country is involved, there may be added difficulties. It may well be that if an alien is told with particularity what it is said he has done It will become quite obvious to him from whence that information has been received. The only person who can judge whether such a result is likely is the person who has in his possession all the information available. That, in this case, is the Secretary of State himself. If he comes to the conclusion that for reasons such as those which I have just endeavoured to outline he cannot afford to give the alien more than the general charge against him, there one has the dilemma. The alien certainly has inadequate information upon which to prepare or direct his defence to the various charges which are made against him, and the only way that could be remedied would be to disclose information to him which might probably have an adverse effect on the national security. The choice is regrettably clear: the alien must suffer, If suffering there be, and this is so on whichever basis of argument one chooses.

[88] Further on the Master of Rolls said:

The judicial system in this country does not consist simply of the courts. It includes a multitude of specialist tribunals and panels (eg the City Take-Over Panel) each with its own remit and procedures. This makes sense. Specialisation makes for better, cheaper and quicker decision making. The hearings of some are open to the public. Others which are involved with intimate personal matters, such as Mental Health Review Tribunals, are not. Most permit representation by lawyers, but it is not self-evident that this is necessarily an advantage. The members of an experienced specialist tribunal or panel adopting a 'hands on' approach may well be able to reach the right conclusion just as often, and a lot more cheaply and quickly, without as with such formal representation.

The judges of the courts do not 'wash their hands' of matters referred to these tribunals and panels. In some cases Parliament has provided for an appeal to the courts on questions of law arising in the course of their work. But in all cases the courts retain a supervisory jurisdiction designed to ensure that their proceedings are fairly and properly conducted in accordance with the law.

And it is the law and the rule of law which governs all. Judges take a judicial oath to 'do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill will.' The 'usages of this Realm' is an old fashioned phrase meaning in this context the customary procedures. Justice is not an abstract concept. It has to have a context and a content. The context is provided by the facts underlying particular disputes. The content is the law.

In individual cases injustice can arise from two quite different sources — human fallibility on the part of the judges or tribunal members and defects in the law. Human fallibility can never be eliminated, but its effects can be and are reduced by dedicated professionalism and by the system making provision for appeals. Defects in the law can be remedied by changing the law, but not by departing from it, an approach which would end by producing far more injustices than it cured. Judges are exhorted by commentators to be 'robust'. If what is meant is that judges should be very ready to re-examine the law in novel or changed circumstances, I agree that judges should indeed be 'robust' and I hope that we are. But if what is meant is that in cases which arouse their sympathy, of which the present could well be one, they should depart from the law, I must disagree.

In the parallel case *Reg v Secretary of State for the Home Department, ex parte B* (unreported), 25 January 1991, which was heard in the Divisional Court of the Queen's Bench Division, Mann LJ said:

> This court is aware of the tension which arises between considerations of liberty and the freedom to live where one wishes and considerations of national security upon the other hand.

So is this court, but two comments may perhaps be made. The first is that, although they give rise to tensions at the interface, 'national security' and 'civil liberties' are one the same side. In accepting, as we must, that to some extent the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties. The second is that it is not only national security which creates such tensions. So does the ordinary administration of justice. A citizen is charged with a very serious offence and remanded in custody. Later at his trial or on appeal he is acquitted. Only he will know for certain whether on the evidence he was extremely lucky to be acquitted, whether he was entitled to be acquitted because, although he did it, the prosecution could not prove it or whether he was wholly innocent. Since the system does not, and perhaps very seldom could, differentiate between these three categories, the wholly innocent accused, who alone has a real grievance at having been detained in prison pending his trial, has to accept his misfortune as part of the price of citizenship in a society in which the rule of law prevails.

The jurisdiction of the courts is not, and never has been, all-embracing. Thus they have no right to consider obligations arising under international treaties. In the case of national security, the responsibility is exclusively that of the government of the day, but its powers are limited by statute and the courts will intervene if it is shown that the minister responsible has acted otherwise than in good faith or has in any way overstepped the limitations upon his authority which are imposed by the law. No lack of good faith has been suggested in this case, but we have fully and speedily investigated the allegation that the Secretary of State had no power to detain the applicant.

[89] Counsels for the applicants' submission on the issue of judicial review by a court however has another facet concerning the powers and jurisdiction of the High Court prior to Malaysia Day. Counsels have referred to art 77(1) (Part VII) The Federation of Malaya Agreement, Report of the Federation of Malaya Constitutional Commission 1957 (para 122) the Federation of Malaya Independence Act 1957 (s 2(1)) and the Malaysia Act (s 3(1)) I do not find however upon perusing those provisions that the powers which were vested in the High Court immediately prior to Malaysia Day include *inter alia* inherent jurisdiction and the power of judicial review. In my view this contention constitutes a sweeping proposition bereft of a proper legal analysis of the provisions. Some of those provisions which were cited have been judicially considered in *Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hongkong* [1986] 2 MLJ 113:

The present High Court is the same as the High Court which was established under the Scheme of the Federation of Malaya Agreement 1948 (cl 77).

At present the High Court is governed by the Courts of Judicature Act 1964 (Act 91), while previously it was governed by a Federation of Malaya (FM) Ordinance, ie the Courts Ordinance 1948. This Ordinance was passed pursuant to cl 77 of the FM Agreement reaffirming the establishment of the High Court and when the country achieved Independence in 1957, the Ordinance continued to be in force without modification at all.

The 1948 Ordinance established a composite Supreme Court consisting of the High Court and the Court of Appeal. The Ordinance set out the original and civil jurisdiction of the High Court in its First and Second Schedules respectively. Italso made provisions in s 99A to the effect that 'the Supreme Court ... shall have the further powers and jurisdiction set out in the Third Schedule to this Ordinance'. The Third Schedule consisted of 26 paras, one of which, being the relevant one for the purpose of this appeal is para 13 which is as follows:

(1) Without prejudice to the generality of art 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which are vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of sub-s (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Pausing at this point for a moment, it is at once clear that the High Court has three types of powers, namely:

(i) those which are vested in the court immediately prior to Malaysia Day;

(ii) those which may be vested in it by written law in force; and

(iii) those powers described as additional powers set out in the Schedule.

The Schedule in the Act contains a list of powers described by s 25(2) as additional powers

To deal with these questions, I think it is necessary to go back to the history of legislation. When the 1948 Ordinance was first passed and came into force on 2 February 1949, the Ordinance then had three Schedules.

[90] Nowhere in the Schedule to the 1948 Ordinance is to be found general provisions relating to the inherent power of judicial review of the High Court as alleged. The current schedule to the CJA 1964 undoubtedly refers, *inter alia*, to the writ of *habeas corpus*. But in the present proceedings the relief sought is not solely confined to the application for a writ of *habeas corpus*. There is here in addition the issue where s 8B is being assailed on the ground that it is *ultra vires* art 4(1) contrary to art 121 and not having gone through the processes of art 159.

[91] Counsels do not deny that there is available the remedy of judicial review under art 128(1) but it is erroneous to contend that the High Court could invoke that jurisdiction when the seat of that jurisdiction is vested in the Federal Court 'to the exclusion of any other court' when the issue sought to be determined is that a law made by Parliament is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament has no power to make law. In essence, what counsels are contending is that the 'pith and substance' of s 8B is to oust the judicial review power of the High court in violation of art 4(1) and in substance derogatory of art 121(1) FC.

[92] In the same breadth there is also sought a declaratory order for the detention to be held unlawful, invalid and a nullity. By virtue of O 15 r 16 of the Rules of High Court 1980 it may be that a declaration can be used to ascertain and determine a point of law but here what is sought is a declaration in respect of a non-justiciable matter that is the Minister's subjective satisfaction based on national security consideration.

[93] In effect there is here compounded together relief sought in lieu of *habeas corpus* or in addition to *habeas corpus*. In my view there is here a wrong choice of procedure if not a misuse. The application for the writ of *habeas corpus* still remain under the Criminal Procedure Code and until O 53 is otherwise

amended the process of the judicial review of administrative decision making processes available under s 365 of the Criminal Procedure Code remain restrictive.

[94] Counsels for the applicants, in my view by attempting to assail the ISA 1960 through the process of judicial review on the ground that s 8B is *ultra vires* art 4(1), art 121(1) and art 128(1) together with the process of applying for the writ of *habeas corpus* have caused this court to embark on an unproductive process as the High Court is not a repository of the 'inherent jurisdiction' to declare a law made by Parliament (ie concerning art 8B) *ultra vires* art 4(1).

[95] On this question I wish merely to reiterate what I have stated in the case of *Kok Wah Kuan v Pengarah Penjara Kajang Selangor* [2004] 5 MLJ 193.

[96] I wish to reiterate the gist of what I have elaborated in respect of the alleged power of review of the High Court under s 84 of the CJA 1964 in that case. This court is being urged not to interpret the Federal Constitution but to declare *ultra vires* a law made pursuant to art 149 on the ground it has contravened art 4(1). In my view counsels have been carried away and have overlooked that if it is the competence of Parliament that is being challenged it is cl (4) of art 4 which is more pertinent and that pertains to art 128(1) of the FC which is to be read with s 81 of the CJA 1964.

[97] This court would in addition decline to derogate to itself the so called inherent powers to declare s 8B *ultra vires* as it would amount to rendering an advisory opinion which in my view is again tantamount to judicial vandalism.

[98] Finally under this heading I need now to revert to the alleged contraventions of art 8 FC. *Sheridan and Groves* again provide certain commentaries which are:

> In *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166, 170, Suffian LP said for the Federal Court: 'The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that 'it must operate alike on all persons in any circumstance, not that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation' ... the law may classify persons ... the law may classify offences into different categories ...; ... fiscal law may divide a town into different areas... All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class...' In *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, 165, Suffian LP set out some of the principles of equality applicable in Malaysia: '(1) The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. (2) The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153. (3) The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in cl (4) and 'practice' in cl (5)(b) of art 8. (4) The prohibition applies to both substantive and procedural law. (5) Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para, (c)); residents in

a particular State as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153). (6) ...the first question we should ask is, is the law discriminatory, and ...if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void. (7) ... the doctrine of classification should be accepted in our courts, subject to ... para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen*. The courts should (not) leave it to the legislature alone to go into the reasonableness of the classification ...the court should consider the reason ableness of the classification. (8) Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law.... (9) In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. (10) Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause....

[99] In urging the court to invoke the application of art 8 counsels for the applicants have alleged that the applicants have been discriminated against as they are now denied trial. Preventive detention is anticipatory action to counteract activities which are apprehended to be prejudicial to the security of Malaysia or any part thereof. Any person or classes of persons detained under s 8 of the ISA is not being charged for any offence leading to a criminal conviction in order to intercept certain activities which are considered prejudicial to security. Therefore there is an intelligible differentia between persons who are detained under the ISA 1960 without trial as opposed to those who are arrested under the Criminal Procedure Code and charged for the commission of offences for the object of detention is to prevent further activities which are considered to the satisfaction of the Minister to be prejudicial to the security of Malaysia or any part thereof.

[100] The subject matter of the equal protection of laws has also been given judicial consideration in *Charanjit Lai v Union of India* AIR 1951 SC 41 where art 14 of the Constitution of India was discussed on account of an Emergency Legislation being challenged on the ground, *inter alia*, that it infringed the right to equal protection of the laws guaranteed by art 14. Although this was a case which pertained to the promulgation of legislation which empowered the government of India to take over and control the management of a company and thus being singled out there are statements which explain classification

although in form, it is also alleged that there is discrimination, As stated by Patanjali Sastri (at p 49):

> A Legislature empowered to make laws on a wide range of subjects must of necessity have the power of a making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object which the Legislature has in view. While, for instance, a classification in a law regulating labour in mines or factories may be based on age or sex, it may not be based on the colour of one's skin. It is also true that the class of persons to whom a law is made applicable may be large or small, and the degree of harm which has prompted the enactment of a particular law is a matter within the discretion ofthe law-makers. It is not the province of the court to canvass the legislative judgment in such matters. But the issue here is not whether the impugned Act was ill-advised or not justified by the facts on which it was based, but whether it transgresses the explicit constitutional restriction on legislative power imposed by art 14.

[101] Likewise Das J also opined at p 65:

> Equal protection of the laws, as observed by Day J in *Southern Railway Co v Greane* (1909) 216 US 400, 'means subjection to equal laws, applying alike to all in the same situation'. The inhibition of the article that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against legislative discrimination amongst equals and to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not, however, mean that every law must have universal application, for all persons are not, by nature, attainment or circumstances, in the same position. The varying in needs of different classes of persons often require separate treatment and it is, therefore, established by judicial decisions that the equal protection clause of the Fourteenth Amendment of the American Constitution does not take away from the State the power to classify persons for legislative purposes. This classification may be on different basis. It may be geographical or according to objects or occupations or the like. If law deals equally with all of a certain well-defined class it is not obnoxious and it is not open to the charge of a denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals. It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary'. Said Day J in *Southern Railway Co v Greane* (1909) 216 US 400 supra:

> While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and the classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.

> Quite conceivable there may be a law relating to a single individual if it is made apparent that, on account of some special reasons applicable only to him and inapplicable to anyone else, that single individual is a class by himself. In *Middleton v Texas Power and Light Co* (1918) 249 US 152, it was pointed out that there was a strong presumption that a Legislature understood and correctly appreciated the needs of its own people, that its laws were directed to problems made manifest by experience and that the discriminations were based upon adequate grounds. It was also pointed out in that case that the burden was upon him who attacked a law for unconstitutionality. In *Lindsley v Natural Carbonic Gas Co* (1910) 220 US 61, it was also said that one who assailed the classification made in a law must carry the burden of showing that it did not rest upon any reasonable basis but was essentially arbitrary. If there is a classification, the court will not hold it invalid merely because the law might have been extended to other persons who in some respects might resemble the class for which the law was made, for the Legislature is the best judge of the needs of the particular classes and to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist.

[102] The alleged violation of art 8 has not been supported by any indication of unreasonable or arbitrary action. The grounds as furnished to the applicants indicate that there is a reasonable nexus between the allegations of facts upon which the Minister has considered in forming his opinion and the purpose for which the power has been exercised. It can be reasonably seen that there is a proximate connection between the ground and allegation of facts upon which they are based and the object of the ISA 1960 namely national security consideration. I therefore hold that the submission advanced on an alleged infringement art 8 as irrelevant.

HEADING NO 1: THE LEGALITY OF THE SECTION 73(1)

[103] The submission of the counsels for the applicants and the Senior Federal Counsels for the respondents indicate that their approach are poles apart. According to the latter, there is no requirement for the court to consider the legality of the s 73(1) arrests and detention as the applicants are now already detained pursuant to a s 8 order. If this is the correct position whatever may be determined on the question of the s 73(1) detention may become totally unnecessary.

[104] I therefore choose to begin by stating that I have made extensive references earlier on to the judgment of Steve Shim CJ (Sabah and Sarawak) wherein his Lordship had clearly opined that s 73(1) and s 8 are capable of being invoked separately without those provisions necessarily having an 'inextricable' connection. Again in his Lordship's words (at p 475):

> Under s 73 (1) a person can be arrested and detained by the police pending enquiries for a maximum period 60 days. This is quite different from the detention effected by order of the Minister under s 8 which may extend to two years. Quite clearly there are two separate detentions involved although they may conceivably fall within one scheme of the preventive detention legislation.

[105] Thus after nearly 15 years there is a departure from the approach in the *Theresa Lim*'s case that 's 73 provides for the initial detention and cannot be divorced from s 8 of the Act' (ISA I960). **A**

[106] In the present proceedings however counsels for the applicants have adamantly maintained that factually there is established the necessary linkage. **B**

[107] The affidavit of the Minister of the Home Affairs which was affirmed on 23 July 2003 contain *inter alia*, para 3, which in no uncertain terms state:

> Pada 25 Januari 2003 jam 5ptg saya telah menerima laporan berkaitan dengan hal penangkapan dan penahanan terhadap pemohon pertama daripada deputi superintenden Yusoff bin Mohd Amin .... menurut peruntukan s 73(3)(c). **C**
>
> Manakala pada jam 5.08ptg saya telah menerima laporan berkaitan dengan hal keadaan penangkapan dan penahanan terhadap pemohon kedua daripada deputi superintenden Yusoff bin Mohd Amin menurut peruntukan s 73(3)(c).

[108] Paragraph 4 of the same affidavit stated *inter alia:* **D**

> Berdasarkan kepada laporan-laporan penyiasatan serta maklumat-maklumat berhubung dengan kegiatan-kegiatan kedua-dua pemohon, saya berpuas hati. Saya sesungguhnya berpuashati bahawa aktiviti-aktiviti yang telah dijalankan oleh kedua-dua pemohon boleh memudaratkan keselamatan Malaysia.

[109] Senior Federal Counsels for the respondents have submitted that through the affidavits of: **E**

(a) M Mukeen, Noor Imran bin Abdul Rahman, the two applicants were arrested and informed of the grounds of arrest;

(b) Mohamed Raby bin Abu Bakar and Nazrurazi bin Mat Daud (both Inspectors) there was compliance with the requirements of s 73(3)(a) of the ISA; **F**

(c) Shunmugum (rank: ASP) there was compliance with the requirements of s 73(3)(b) of the ISA;

(d) Amir Hamzah bin Ibrahim and Yusoff bin Mohd Amir (both DSP) there was compliance with the requirements of s 73(3)(c) of the ISA. **G**

[110] Counsels for both the applicants have disputed that there was compliance in the procedures stipulated under s 73 as outlined above but it remained clear that the basis of disputing their submission that there was failure on the part of the respondents to observe compliance with the procedures laid down under that section was still the absence of more factual details concerning the investigations that may have been made and any reports thereon. **H**

[111] I hold the view that in terms of the procedural requirements of s 73 there is no gap or flaw in the process involving the arrests and detention. The crux of the matter here is not that procedures have not been complied with. **I**

Senior Federal Counsels and counsels for the applicants are actually opposed on what constitutes an 'objective' test as expounded in *Ezam*'s case.

[112] Counsels for the applicants have submitted as follows:

(a) The test applicable to s 73 is also the objective test. This entails the question whether a police officer has the required 'reason to believe' when he makes the arrest and detention 'reliance on s 73(1) is objectively justiciable;

(b) To satisfy the preconditions of s 73(1) besides the affidavits having to state that the detenu/applicants were told that they were arrested and detained forhaving acted in a manner likely to prejudice the security of the country, they must also be told the grounds for their arrest (which must be the grounds which would justify making of a s 8 order). It was also contended that the arresting officers must explain the reasons for their belief in arresting the detainees.

[113] The above-mentioned are said to be derived from the combined extracts of propositions found in the judgments of Dzaiddin CJ (as he then was); Steve Shim CJ (Sabah & Sarawak) and Malek Ahmad FCJ in the *Ezam*'s case. Emphasis was also emplaced by counsels for applicants on the following statements of the Chief Justice (Sabah and Sarawak) at p 479:

> What are these preconditions in s 73(1)? Therein, the police officer must have reason to believe: (a) that there are grounds which would justify the detention of the detainee under s 8 and (b) that the detainee has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. In this case, I think the affidavits filed by the respondent do indicate that at the time of their arrests, the detainees were told that they were arrested and detained for having acted in a manner like to prejudice the security of the country. Based on the authorities cited earlier, this would be sufficient to comply with s73(1)(b). *However, the situation is quite different with respect to s 73(1)(b). Here, the burden is on the respondent to satisfy the court by wav of material evidence that the detaining authority had reason to believe that the detainees had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. A thorough perusal of the affidavits filed by the respondent find them to contain nothing more than bare denials in response to the alleaations contained in the affidavits affirmed* by the respective appellants. This is hardly surprising given his reliance on s 16 of the ISA and art 151(3) of the Constitution. No particulars have been disclosed in the respondent's affidavits to show that the appellants had acted or were about to act or were likely to act in any manner prejudicial to the security of Malaysia, etc. In the circumstances, para (b) of sub-s (1) of s 73 has not been discharged by the respondent. Furthermore, the matters disclosed in those affidavits do not seem to have any bearing on the press statement issued by the Inspector-General of Police. In effect, the respondent has not discharged the initial burden of satisfying the court as to the jurisdictional threshold requisite under s73(1). (Emphasis added.)

[114] The underlying argument propounded by counsels for the applicants against the affidavits in opposition that have been filed by respondents is that there is here an absence of jurisdictional facts (or the expression 'threshold jurisdiction' found in *Ezam*'s case). According to the applicants' contention the exercise of the decision of the police to arrest and detain is dependant upon the existence of facts or sets of facts which the authority have failed to adduce in detail in their affidavits.

[115] It is not denied in this case that the affidavit of Mukeen (at para 11) specifically refers to s 16 ISA and again to be read with art 151(3) FC in relation to non disclosure of the facts received and the investigation that may have been conducted relating to the activities of the applicants. Paragraph 12 in the affidavit of Noor Imran contains the same reference.

[116] I have already earlier on elucidated the relevant excerpts of the judgment of his Lordship Steve Shim (CJ Sabah and Sarawak) on the reasons for the departure in the approach that was applied in *Theresa Lim*'s case, but the relevant excerpts on this specific point is however reproduced:

> Section 16 (of the ISA) states:
>
> > Nothing in this chapter or in any rules made thereunder shall require the Minister or any member of the Advisory Board or any public servant to disclose facts or to produce documents which he considers It to be against the national interest to disclose or produce.
>
> The learned High Court judge, following the decisions in *Re Tan Sri Raja Khalid* and *Theresa Lim*, takes the view that the right of non-disclosure under s 16 makes the test under s 73(1) a subjective one. Here, I think it is important to note the actual wording in s 16. It is expressly stated to be applicable only in relation to Ch II, Pt II of the ISA. To read it as applying to s 73 which falls under Pt IV would clearly be contradicting the expressed intention of Parliament. It is interesting to note that this line of argument was canvassed before the Federal Court in *Theresa Lim*. In rejecting it, Salleh Abbas LP said this at p 296:
>
> > This argument could only be right If we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under s 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under s 8, but nevertheless, it is within one scheme of the preventive detention legislation.
>
> In my view, it must surely be a matter of common sense that any detention involves the restriction or curtailment of the liberty of an individual. Any detention order must necessarily result in the deprivation of freedom without trial and constitutes a serious transgression upon the fundamental liberty of a person. So serious indeed that Abdoolcader J in *Yeap Hock Seng* was prompted to say at p 281:

> The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State Ex Rel Evans v Broaddus* 245 Mo 123 at p 140 that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

> Under s 73(1), a person can be arrested and detained by the police pending enquiries for a maximum period of 60 days. This is quite different from the detention effected by order of the minister under s 8 which may extend to two years. Quite clearly, there are two separate detentions involved although they may conceivably fall within one scheme of the preventive detention legislation.

[117] The judgment of Malek Ahmad FCJ however also indicated another aspect. It would appear that in *Ezam*'s case the Senior Deputy Public Prosecutor gave another twist to the effect of s 16 ISA 1960 in that he conceded that the s 16 does not apply (ie to the s 73 situation). His reason (as stated in [2002] 4 MLJ p 499 A–B) however was that for purposes of s 73 and s 8, s 16 is effectively redundant.

[118] In my understanding based on this concession and the views of MP Jain the Federal Court arrived at the conclusion that 'there is merit in the proposition that art 151(3) merely bars information concerning matters of national security from being disclosed to the detainee and not to the court as such'.

[119] With all due deference however, I find that s 16 still has its purpose. There is no doubt that s 16 has been specifically found in Chap II. But that does not lead to the conclusion art 151(3) could no longer be applicable to the other parts of the ISA 1960 and more specifically to the s 73.

[120] In my considered opinion art 151(3) is a general safeguard clause where the words are 'This article does not require *any authority* to disclose facts whose disclosure would *in its opinion be against the national interest*'. Therefore given its ordinary meaning the words are wide and embracing. In addition the existence of s 16 only seeks to emphasis that even in the context of Chap II the rule against disclosure applies with equal force. In other words, in my view the insertion of s 16 *is not* a redundance, not even superfluous but inserted *exabundanti cautela*. (Emphasis added.)

[121] It is also my considered opinion that to require the arresting officers or the officers who are acting in furtherance of s 73 to disclose certain matters or information which are classified or which in their opinion to be against national interest to do so, without certain changes being made to existing legislation would lead to uncertainties which are not feasible particularly in the field of criminal law. It makes no difference that the information is said to be disclosed to the court and not to the person detained.

[122] Malaysia has not reached the stage where either privacy laws or legislation pertaining to access to information has been laid in place. Senior Federal Counsels for the respondents in their submission have drawn this court's attention to s 2C of the Official Secrets Act 1972 (OSA 1972) which provides *inter alia*:

> 2C Declassification of official secret by a Minister or a public officer
>
> A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service may at any time declassify any document specified in the Schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.

[123] In the instant case before me both Minister and officers have claimed the immunity of non disclosure. In my view the issue of what would and could be disclosed would throw open the field to the following questions:

(a) would the court accept immunity for a class of documents or the claim to specific contents basis;

(b) is the rule of discovery capable of being extended to habeas corpus proceedings such as the present;

(c) would the Attorney General advise a Minister to enter a plea of public interest immunity.

[124] There are therefore questions as to the extent to which the court should compel the production of documents containing information supplied in confidence by informers to enforcement agencies (in this case the police) responsible for the enforcement of the law or the maintenance of national security. The consequence of disclosure may have consequences on the ability of the enforcement agency to obtain information.

[125] The refusal to disclose further information here concerns a threat to national security which if the linkage between s 73 and s 8 on the facts of the present case are accepted, I find that the court has to accept the refusal to disclose unless it is possible to discern that the opinion is one which no reasonable person could in the circumstances have reasonably have held.

[126] As stated by Lane LJ (although it was observed in the context of a deportation order) in *R v Secretary of State of Home Affairs, ex p Hosenball*[1977] 1 WLR 766 pp 783–4 :

> There are occasions, though they are rare, when what are more generally the rights of an individual must be subordinated to the protection of the realm In ordinary circumstances common fairness — you can call it natural justice if you wish — would demand that he be given particulars of the charge made against him; that he is given the names of the witnesses who are prepared to testify against him and, indeed, probably the nature of the evidence which those witnesses are prepared to give should also be delivered to him. But there are counter balancing factors.

[127] Returning now to the facts of the present case I wish to observe a further point. *Ezam*'s case was a decision of the Federal Court dated 6 September 2002 which dealt with the question of the application of s 73 and the objective test. On 9 August 2003 (*Nasharuddin*'s case) the Federal Court reaffirmed that the subjective applies to s 8 and it was reinforced by the existence of s 16 ISA. In the intervening period the Federal Court in *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 delivered another decision although the case pertained to detention under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, The appellants in that case were arrested under s 3(1) and detained under s 4(1) of that Ordinance. It was in evidence that they were not informed of the grounds of arrest. Counsel for the appellants contended that this contravened art 5(3) of the FC. It was submitted that as the Ordinance was silent on the requirement of being informed on the grounds of arrest and therefore Article 5(3) FC should be read into the former. The majority judgment (coram 3) delivered by Ahmad Fairuz CJ (Malaya) as he then was held *inter alia* (at p 235):

> In the light of art 150(2) and (6) FC, s 3(1) of the Ordinance clearly cannot be contended to be invalid just because it is inconsistent with art 5(3) FC. What is the purpose of not invalidating s 3(1) if it is not for validating an arrest or detention which becomes unlawful due to non-compliance of art. 5(3)? I am of the view that if s 3(1) is inconsistent with art 5(3) then s 3(1) must prevail over art 5(3). This would save the arrest and detention which would have been unlawful because of violation of art 5(3). This in my view is the purpose of art. 150(6) FC. If s. 3(1) is not inconsistent with art. 5(3) then, according to the appellants, violation of art 5(3) would cause the arrest and detention improper and unlawful. Surelythis cannot be the purpose and intention of art 150(6). Such a construction would make an unlawful arrest (because of contravention of art 5(3)) lawful because s 3(1) is inconsistent with art 5(3) but the arrest would remain unlawful because s 3(1) is not inconsistent with art 5(3). This surely would defeat the whole purpose of art150. Furthermore, s 3(1) only requires the arresting officer to have 'reason to believe that there are grounds ...'. It does not require the grounds to be informed to the arrested person. And even if it is so required because of art. 5(3) FC, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art 5(3). The grounds were those that would justify a detention under s 4(1) of the Ordinance. Viscount Simon in *Christie v Leachinsky* [1947] 1 All ER 567 at p 572, said:

> These citations, and others which are referred to by Lord Du Parcp seem to me to establish the following propositions:
>
> …
>
> 4 The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his

freedom *if he knows in substance the reason* why it is claimed that this restraint should he imposed. (Emphasis added.)

…

[128] In the present case before me it was never denied that the police officer had stated that he had reasons to believe that there are grounds that justify the detention of the applicants and that immediately upon arrests the applicants were informed of the grounds of arrests. Their arrest and detention were effected on 29 December 2001 namely before, the decision in *Ezam*'s case. The question is whether *Ezam*'s case should have retrospective effect in relation to its ruling that s 16 does not apply other than in Chap II. I have already stated that on the question of interpretation art 153 still applies even to a s 73(1) question.

[129] In *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 Gopal Sri Ram JCA in delivering the decision of the Court of Appeal stated (at p 304):

The second point raised by the learned deputy is that the present case was decided before *Muhammed bin Hassan*. With respect, that again is no answer. It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v Walter* (1965) 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *PP v Dato' Yap Peng* [1987] 2 MLJ 311, where, at pp 320–321, Abdoolcader SCJ said:

The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v Walker* (1965) 381 US 618 (at p 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LG Golak Nath v State of Punjab & Anor* AIR 1967 SC 1643 (at pp 1666–1669). The doctrine to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under the statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England, this doctrine has been recognised by the House of Lords by necessary implication in the Practice Statement (Judicial Precedent) Vol 123 DLR (Third) 554 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investment Ltd v Jeromnimon* [1981] 2 WLR 80, Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

Although *Linkletter v Walker* and *PP v Dato' Yap Peng* concerned the constitutionality of statutes, the same principle applies to decisions in other areas of the law. This appears sufficiently from the cases of *Jones v Secretary of State for Social Services and another appeal* [1972] AC 944 and *Choice Investments Ltd v Jeromnimon and another appeal* [1981] 2 WLR 80, both of which are referred to in the passage above quoted.

[130] However in the present case to allow the ruling in *Ezam*'s case to apply retrospectively to require the police officers to disclose information may subject them to certain penalties or censures under the OSA 1972. I hold the view that the relevant legislation has to be changed or certain procedures be emplaced before the court would compel the disclosure of information where national security consideration is being specifically impleaded for nondisclosure of information. I would not go so far to agree with the Senior Federal Counsels' contention that the court would be usurping the function of the Minister. However, in view of the reasons that I have mentioned above I would be constrained to hold the that the failure to disclose the information as alleged by the applicants have resulted in the legality of the arrests and detention of the applicants under s 73(1) being tainted with illegality and hence flawed.

[131] Thus while there is an alleged linkage between the s 73(1) and the s 8 detention, nevertheless there remain two detention. During the proceeding, I have posed the parties the question as to what point of time after the s 73 detention is effected should further and better particulars be furnished to the court should the persons be further detained by a s 8 order. No responses have been forthcoming and further to that no additional affidavits have been filed by the respondents. I glean from this that the respondents are still maintaining the position of nondisclosure on the basis of art 151(3). I have not therefore directed the filing of further affidavits from the respondents.

[132] For the various reasons that I have elaborated above I hold the view that the applicants have been lawfully detained pursuant to the power of the Minister under s 8 and neither does the alleged linkage with the s 73(1) detention render it illegal.

[133] The applications for *habeas corpus* in respect of both applicants are therefore refused.

Applications for habeas corpus dismissed.

Reported by Sugandra Rao

A

B

C

D

E

F

G

H

I